Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1994

BRYAN VERCOE,

Petitioner,

vs.

FIRSTIER BANK, N.A., OMAHA, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether a trustee of an ERISA qualified plan is subject to strict liability if they fail to avoid a conflict of interest and they benefit directly and indirectly from the transaction at issue.

II.

Whether a trustee may be awarded an attorney fee from an ERISA qualified plan without the court applying a five factor formula.

III.

Whether a pattern of racketeering that is in continuous existence for three years satisfies the continuity requirement of the Racketeer Influenced Corrupt Organizations Act.

IV.

Whether an ERISA trustee must fully inform the beneficiary of his rights and the effect of a transaction before a beneficiary may consent to a breach of the trust if the trustee knows or should know that a breach of trust is occurring.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings below, not listed in the caption, consist of the following Respondents:

Respondents:

George Silence

Management Consultants, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

ARGUMENT 7

I. AN ERISA TRUSTEE THAT ACTS IN A TRANSACTION IN WHICH THEY HAVE A CONFLICT OF INTEREST SHOULD BE SUBJECT TO STRICT LIABILITY 7

II. IT IS ABUSE OF DISCRETION AS A MATTER OF LAW FOR A COURT TO AWARD AN ATTORNEY FEE AGAINST AN ERISA PLAN WITHOUT FOLLOWING A FIVE FACTOR FORMULA 15

III. A PATTERN OF RACKETEERING THAT LASTS FOR MORE THAN THREE YEARS IS CONTINUOUS 20

IV. A BENEFICIARY OF AN ERISA PLAN MUST BE FULLY INFORMED OF HIS RIGHTS BEFORE HE CAN CONSENT TO A BREACH OF TRUST 22

CONCLUSION 27

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Employees' Retirement Plan, 938 F.2d 1245 (11th Cir. 1991) 16

Bose Corporation v. Consumers Union of United States, Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) 10

Brown v. Blue Cross and Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990) 7, 11, 18

Chambless v. Masters, Mates & Pilots Pension Plan, 815 F.2d 869 (2nd Cir. 1987) 16

Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978) 16

Firestone Tire and Rubber Co. v. Binch-Cite, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) 12

Franklin v. Thornton, 983 F.2d 939 (9th Cir. 1993) 17

Fulton Nat'l Bank v. Tate, 363 F.2d 562 (5th Cir. 1966) 8

Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 258 (1st Cir. 1986) 16

Hammell v. S.E. Rykoff & Co., 634 F.2d 446 (9th Cir. 1980) 16

H.J. Inc. v. Northwestern Bell Tele. Co., 492 U.S.C. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) 21, 22

Iron Workers Local #272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980) 16

Lawrence v. Westerhaus, 749 F.2d 494 (8th Cir. 1984) 16

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) 10, 16, 18

TABLE OF AUTHORITIES – Continued

Page

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) ...7, 11

Mertens v. Hewitt and Associates, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 161 (1993) 7

NLRB v. Intertherm, Inc., 596 F.2d 267 (8th Cir. 1979) 12

Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) 18

Quesinberry v. Life Ins. Co. of North America, 987 F.2d 1017 (4th Cir. 1993) 17

Reinking v. Philadelphia American Life Insurance Co., 910 F.2d 1210 (4th Cir. 1990) 16

Sec'y of Dept. of Labor v. King, 775 F.2d 666 (6th Cir. 1985) 16

United States v. Aceto Agric. Chem. Corp., 872 F.2d 1373 (8th Cir.) 21

United States v. American R. Express Co., 265 U.S. 425, 44 S.Ct. 560, 682 L.Ed. 1087 (1924) 16

United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980) 20

Ursic v. Bethlehem Mines, 719 F.2d 670 (3rd Cir. 1983) 16

U.S. v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990) 20

U.S. v. Richberg, 378 F.2d 523 (5th Cir. 1968) 11, 24

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. Section 1961(1)
Racketeer Influenced Corrupt Organizations Act 20

18 U.S.C. Section 1961(1)
Section 664 20

29 U.S.C. 158(a)(1) of the Labor Management Relations Act

Section 8(a)(1) 12

29 U.S.C. Section 1104(a)(1)
Section 404(a)(1) of ERISA 9, 11, 25

29 U.S.C. Section 1105(a)(2)
Section 405(a)(2) of ERISA 25

29 U.S.C. Section 1108(b)(1)
Section 406 of ERISA 25

29 U.S.C. Section 1108(b)(1)
Section 408(b)(1) of ERISA 9, 25

29 U.S.C. Section 1132
Section 502 of ERISA 5

29 U.S.C. Section 1132(g)(1)
Section 532(g) of ERISA 15

29 U.S.C. Section 1132(h)
Section 532(h) of ERISA 16

29 U.S.C. Section 1141
Section 511 of ERISA 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITY

IIA *Scott on Trusts*, Section 185 at 574.... 22, 23, 25, 26

Fed. Reg. Vol. 54, pp. 30,519-30,530 (1989).... 11, 25, 26

G. Bogert & G. Bogert, *Law of Trusts and Trustees*, Section 941, p.457 (2nd Rev. Ed. 1982) 13, 26

G. Bogert & G. Bogert, *Law of Trusts and Trustees*, Section 543, at 67 (Revised 2d edition 1992)..... 8

Hermel and Colling, *The Chinese Wall and Conflicts of Interest in Banks*, 34 The Business Lawyer 73, 102-103 (1978) 9

Restatement (Second) of Trusts, Section 170 Comment w. (1959) 13, 24

Restatement (Second) of Trusts, Section 174 Comment b. (1959)..... 14

Restatement (Second) of Trusts, Section 184 (1959)..... 26

Restatement (Second) of Trusts, Section 185 Comment e (1959) 26

Restatement (Second) of Trusts, Section 203 (1959)..... 8

Restatement (Second) of Trusts, Section 205, Comment a (1959) 8, 26

Restatement (Second) of Trusts, Section 206 (1959)..... 8

Restatement (Second) of Trusts, Section 216(2) (1959) ..12, 24

Restatement (Second) of Trusts, Section 216(3) (1959) 12

Restatement (Second) of Trusts, Section 216 Comment a (1959) 13, 24

REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

1. Memorandum Opinion and Order of the District Court (unreported) June 15, 1990. *FirsTier Bank, N.A. Omaha v. Land Paving Company, et al.* App. 1

2. Findings of Facts and Conclusions of Law of the District Court (unreported) December 6, 1991. *FirsTier Bank N.A. Omaha v. Land Paving Company, et al.* App. 13

3. Order (unreported) October 14, 1992. *FirsTier Bank N.A. Omaha v. Land Paving Company, et al.* App. 30

4. *FirsTier Bank N.A. Omaha v. Zeller, et al.*, 16 F.3rd 907 (8th Cir. 1994), rehearing and rehearing en banc denied.

JURISDICTIONAL STATEMENT

The date of the original Opinion in this case issued by the court below is February 16, 1994. A two-week extension of time to file a Petition for Rehearing and Suggestion for Rehearing en banc was granted. A Petition for Rehearing and Suggestion for Rehearing en banc was filed on March 16, 1994 and denied on April 18, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rule 10 of this Court.

STATUTORY PROVISIONS

1. Section 404(a) of the Employee Retirement Income Security Act, 29 U.S.C. Section 1104(a)

STATEMENT OF THE CASE

For all terms relevant hereto, Anthony Dombrowski was President of Land Paving Company (LPC) and the Plan Administrator of LPC's Profit Sharing Trust (the "Plan"). Accordingly, he was a fiduciary under ERISA.

Since its inception, FirsTier or its predecessor entity, Omaha National Bank, was the trustee of the Plan and, accordingly, was a fiduciary for the purposes of ERISA. Stanley A. Traub and Thomas Moore were officers of FirsTier or its predecessor entity. By April of 1987, Thomas Moore was FirsTier's Vice President, Traub's supervisor and also was on FirsTier's Board of Directors. Traub was the Vice President of FirsTier's Trust Department.

In December of 1986, LPC was deeply in debt, primarily to FirsTier and, accordingly, was in a precarious financial condition.

On March 27, 1987, Dombrowski had LPC's Board resolve to substitute Dombrowski for FirsTier as trustee in the Plan. A copy of the resolution was delivered to Traub at FirsTier. Upon receipt of the resolution, Traub contacted Moore. In their ensuing conversation, Moore informed Traub that FirsTier was a creditor LPC and that LPC was in financial difficulty. Moore knew this because he was on FirsTier's Board and the Board had been informed of LPC's financial problems. Moore also informed Traub that LPC was in danger of defaulting on their loan to FirsTier.

After this discussion, Traub then contacted Dombrowski. A meeting was held between Moore, Traub and Dombrowski. In this meeting, Dombrowski stated that he

wanted FirsTier to purchase annuities with the funds in the Plan and return any excess to LPC. The transaction Dombrowski was proposing was in violation of the Plan and ERISA. FirsTier refused to step down as trustee or transfer the funds in the Plan to Dombrowski because Traub knew of LPC's heavy indebtedness and feared misuse of Plan assets based upon Dombrowski's request to transfer funds in the Plan to LPC. Additionally, Dombrowski lacked the proper fidelity bond.

A few days later, Dombrowski initiated a meeting with employees: Duane Olsen (who subsequently died prior to inception of the suit), James Lonergan, Bryan Vercoe and James Zeller. Olsen was vice president of LPC and the other individuals were non-management employees. At this meeting, he informed them that LPC would close its doors unless they borrowed from their individual Plan accounts and reloaned the proceeds to LPC for the purpose of paying down LPC's debt to FirsTier. In 1984, Dombrowski had initiated a meeting with Lonergan, and informed him that LPC would cease operations unless he transferred funds from the Plan to LPC. Lonergan transferred $42,500.00 to Dombrowski in a transaction identical to the transaction at hand, except for the amount of the transfer. Lonergan has never been repaid on this loan.

On March 31, 1987, the total amount in the Plan was $588,719.84. The four aforementioned employees (hereinafter employees) interest in the aforementioned amount was $307,514.28 and Dombrowski's interest was $126,772.50. The other participants' interests totalled $154,433.36. In addition to Lonergan's loan, Dombrowski had also borrowed $50,000 from the Plan. Pursuant to the

Plan, a participant could borrow from the Plan, 50% of his total equity, up to $50,000.

On April 2, 1987, Dombrowski as Plan Administrator wrote Traub, directing FirsTier to make loans on an expedited basis to Lonergan, Zeller, Vercoe and Olsen pursuant to paragraph 20 of the Plan, which provides that "[t]he Trustee may, and shall at the direction of the Company, make a loan or loans to a Participant." FirsTier promptly prepared loan documents, obtained the employees' signatures on installment notes secured by their interests in the Plan, and disbursed loan proceeds totalling $93,950 to the individual employees. The foregoing represented the maximum amount each of the four employees could borrow.

Traub and Moore were aware of and approved of the participant loans in question. FirsTier never inquired as to the purpose of the loans, determined that the employees were not being coerced, informed the employees that the transaction was a breach of trust, or informed the employees that Land Paving was in danger of defaulting on their loan to FirsTier.

The foregoing factual discussion regarding the events from March 27, 1987 until the loans in question and the extent of FirsTier's knowledge of LPC's financial condition is based entirely upon the testimony of Traub and Moore at trial. This testimony was received into evidence by the trial court without objection and Moore and Traub's testimony was not refuted by any party to the proceeding.

The employees transferred the loan proceeds to Dombrowski's personal account at another bank, receiving

promissory notes from LPC and Dombrowski in return. Dombrowski then wrote a $240,000 check on this account to LPC, which used the money to fund part of its March 31 loan payment to FirsTier and to pay a consulting fee to a third party. LPC went into bankruptcy in June, 1987 and its operating assets were sold. Both the Plan's loans to the employees and their loans to LPC and Dombrowski remain unpaid.

FirsTier filed a declaratory judgment action pursuant to 502 of ERISA (29 U.S.C. Section 1132), seeking a declaration of its status with respect to the Plan. The employees answered and admitted eleven out of seventeen paragraphs of the Complaint. With the exception of FirsTier's request to be relieved of liability, the unresolved issues not admitted by the employees were settled pursuant to stipulation prior to trial. The employees filed counter claims and cross claims against FirsTier and Dombrowski alleging violations of ERISA and RICO and demanded a trial by jury. The employees plead that Dombrowski forced them to borrow from the Plan in 1984 and 1987. The employees plead that FirsTier knew or should have known the details of the 1987 loan and that FirsTier conspired with Dombrowski in making indirect and direct transfers to parties at interest.

The district court summarily dismissed the employees' RICO claims and tried their ERISA claims and FirsTier's declaratory judgment claim to the court. At trial, FirsTier alleged that it was not a fiduciary under ERISA and, accordingly, had no duty to the employees. The trial court held that FirsTier was a fiduciary for the purposes of ERISA. However, the court found that LPC's direction to FirsTier and the subsequent loans of Plan assets to the employees were proper under paragraph 20

of the Plan and ERISA; that FirsTier did not know and should not have known that the employees would immediately lend the loan proceeds to LPC at the request of Dombrowski; and that FirsTier did not know and should not have known that the participant loans funded a portion of LPC's March 31 loan payment to the bank. Based upon these findings, the court concluded that FirsTier had not violated its fiduciary duties under ERISA.

FirsTier filed a fee application with the court. Included in this fee application was time spent and expert witness fees incurred in supporting its contention that it was not a fiduciary pursuant to ERISA. The trial court awarded FirsTier Sixty-Four Thousand Nine Hundred Twelve Dollars and Forty-Four Cents ($64,912.44) in attorney fees and costs, which was the entire amount FirsTier requested. The trial court did not apply a five factor formula test to the award or reduce the award in any manner for time and costs incurred in supporting a legal position that the trial court had ruled was erroneous as a matter of law or apply the other criterion of the five factor test.

The employees filed a notice of appeal to the Eighth Circuit and FirsTier did not. In their brief, FirsTier attempted to raise as errors the trial court's holding that the appellants had properly notified the Secretary of Labor of the suit and the trial court's holding that FirsTier was a fiduciary. FirsTier included in their application time incurred pertaining to the issues it attempted to raise in their cross appeal made in their brief. On appeal, the employees raised issues relating solely to their counterclaim. FirsTier prevailed on appeal and was awarded the entire amount of attorney fees and costs that it

requested, totalling $23,434.70. The Eighth Circuit did not make any allowance for time incurred by FirsTier in raising issues alleging that the lower court erred even though FirsTier had not filed a notice of appeal, or apply the five factor test.

ARGUMENT

I. AN ERISA TRUSTEE THAT ACTS IN A TRANSACTION IN WHICH THEY HAVE A CONFLICT OF INTEREST SHOULD BE SUBJECT TO STRICT LIABILITY

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142-143, 105 S.Ct. 3085, 3091, 87 L.Ed.2d 96 (1985), the Supreme Court held that ERISA imposes certain duties on behalf of a trustee, among these are the duties to act prudently and the "avoidance of conflicts of interest." This standard was recently reaffirmed in the most recent Supreme Court ruling. *Mertens v. Hewitt and Associates*, 508 U.S. ___, 113 S.Ct. ___, 124 L.Ed.2d 161, 167 (1993).

In *Brown v. Blue Cross and Blue Shield of Alabama*, 898 F.2d 1556 (11th Cir. 1990), the Eleventh Circuit held that under the foregoing duty:

> "[T]he beneficiary need only show that the fiduciary allowed himself to be placed in a position where his personal interest *might* conflict with the interest of the beneficiary. It is unnecessary to show that the fiduciary succumbed to this temptation, that he acted in bad faith, that he gained an advantage, fair or unfair, that the beneficiary was harmed.
>
> Indeed, the law presumes that the fiduciary acted disloyally, and inquiry into such matters is

> foreclosed. The rule is not intended to compensate the beneficiary for any loss he may have sustained or to deprive the fiduciary of any unjust enrichment. Its sole purpose and effect is prophylactic . . .
>
> *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 571-72 (5th Cir. 1966) (emphasis in original)
>
> *Id* at 1565."

The foregoing prohibits a trustee from realizing any direct or indirect advantage. *Fulton Nat'l Bank v. Tate*, supra, at 573. If a violation has occurred, the beneficiary can either void the transaction or force the trustee to disgorge all profit directly or indirectly realized. *Restatement (Second) of Trusts*, Section 205, Comment a (1959). The exception to this rule is that there is no nexus between the alleged conflict and the transaction in question. G. Bogert & G. Bogert, *The Law of Trusts and Trustees*, Section 543, at 67 (Revised 2d edition 1992) (accord *Fulton Nat'l Bank v. Tate*, 363 F.2d 562, 572 (5th Cir. 1966). This concept is sometimes expressed that the conflict in question was too feeble or too remote. *Fulton Nat'l Bank*, supra, at 577, n.26. The foregoing principles of law were developed because the beneficiary of a trust is entitled to have their trust administered by a trustee that is above suspicion. *Id.* at 573. If the trustee violates the foregoing principles, he proceeds at his own peril, *Id.* at 572, which is, in effect, strict liability. See, *Restatement (Second) of Trusts*, Sections 203 and 206 (1959).

At trial, both Traub and Moore testified under direct examination by their lawyer that Moore informed Traub that FirsTier was a creditor of LPC and that LPC was in financial difficulty prior to their March 27th meeting with

Dombrowski. Moore also testified that he knew that LPC was in financial difficulty because FirsTier's loan to LPC had been reviewed by FirsTier's Board of Directors and that FirsTier's Board did not review every loan. Traub's testimony was in complete accord with Moore regarding the fact that Moore informed him of LPC's financial condition and that FirsTier was a creditor prior to their meeting with Dombrowski. More importantly, Traub testified that Moore informed him that LPC was in danger of defaulting on their loan to FirsTier.

The foregoing testimony of Moore and Traub was not refuted or contradicted in any manner by the employees or FirsTier at trial.

The significance of these unrefuted admissions against interest is that they clearly establish, as a matter of law, a situation in which the trustee's motive might be questioned. See Hermel and Colling, *The Chinese Wall and Conflicts of Interest in Banks*, 34 The Business Lawyer 73, 102-103 (1978). One of the abuses that ERISA was designed to alleviate was an indirect transfer to a party at interest.[1] In the case at hand, it is an undisputed fact that the Plan Trustee knew that LPC was in financial difficulty and that LPC's financial status was jeopardizing his company's loan. Obviously, a $93,950 cash infusion would be

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[1] Although Section 408(b)(1) of ERISA (29 U.S.C. Section 1108(b)(1)) exempts participant loans, the drafters of ERSIA did not consider an indirect transfer back to a trustee as too "remote" in a dual loyalty situation. Otherwise, they would not have subjected an ERISA fiduciary involved in a plan participant loan to Section 404(a)(1) of ERISA. (29 U.S.C. Section 404(a)(1)), which incorporates the duty of loyalty. The Petitioners were also requesting a total of $93,950. Certainly this amount is not feeble.

a tremendous indirect benefit. It would be of even greater benefit to FirsTier if these funds were used to make a payment on LPC's loan to FirsTier, which the trial court found did, in fact, occur. (App. 20). This cannot be stressed in strong enough terms because the transfer back to FirsTier clearly establishes the required nexus between the conflict and the transaction in question.

The Eighth Circuit's decision only alludes to the conflict issue and does not deem it controlling. In fact, when the employees attempted to raise the trial court's failure to incorporate the conflict of interest issue into the court's decision, the Eighth Circuit ruled that this assignment of error was frivolous. (App. 42). The Eighth Circuit also implies that the employees contended that a conflict exists by the mere fact that the bank was a creditor. (App. 49, footnote 6). This view is erroneous. It is not the fact that the bank was a creditor, but the extent of the trustee's knowledge regarding the bank's loan and the fact that he knew LPC's president and Plan administrator had requested funds from the Plan for LPC's use. The Plan trustee refused this because of his fear of possible asset dissipation.

The Petitioner is well aware of the standard of review of an appellate court. However, the evidence that was omitted is based entirely upon admissions against interest made by a party opponent at trial. Accordingly, an appellate court is not bound by the grossly erroneous standard and should simply apply the law to the undisputed facts. *Leigh v. Engle*, 727 F.2d 113, 124 (7th Cir. 1984); *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1959-1960, 80 L.Ed.2d 502, 517 (1984). But more importantly, a trial

court abuses its discretion if the findings of fact are findings induced by a misapprehension of controlling substantive principles. *U.S. v. Richberg*, 378 F.2d 523 (5th Cir. 1968). Pursuant to common law and *Brown v. Blue Cross*, this conflict of interest would be controlling because the trustee derived an indirect and direct benefit in a transaction in which they had dual loyalties. Accordingly, the doctrine of strict liability would apply and the Petitioner would be entitled to void the transaction as a matter of law.

The Eighth Circuit's failure to incorporate the strict liability standard is predicated upon an erroneous view of ERISA. In the legislative history, Congress made it very clear that a trustee that was involved in a plan participant loan was subject to the general fiduciary rules of ERISA. (See Department of Labor's comments to the final regulations governing plan participant loans. 54 Fed. Reg. 30,519-30,530, 30,521 (1989) (App. 65).)

As previously noted, this Court has held that the general duties include the duty to act prudently and to avoid conflicts of interest. See ERISA Section 404(a)(1) (29 U.S.C. Section 1104(a)(1)) and *Massachusetts Mutual Life Ins. Co. v Russell*, supra. However, the Eighth Circuit held that a trustee was only subject to the general fiduciary duty to act "prudently" and did not include the duty to avoid conflicts of interest. (App. 44-45). Thus, the Eighth Circuit's opinion is in contravention of common law, the Eleventh Circuit, decisions of this Court, and the underlying statutory authority. The Eighth Circuit is also in contravention of the law regarding the issue of the employees' consent.

At trial, Dombrowski testified that he had initiated a meeting and informed each of the employees that unless they borrowed from the Plan and loaned these proceeds to him, LPC would cease operations and the employees would lose their jobs. The trial court held that this did not amount to coercion. (App. 20). The Eighth Circuit held that although a different conclusion could be justified, that this finding was not abuse of discretion. (App. 49).

Section 511 of ERISA (29 U.S.C. Section 1141) protects a plan participant from coercive interference. However, the Petitioner has been unable to locate any cases defining coercive interference under ERISA.

In *Firestone Tire and Rubber Co. v. Binch-Cite*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), this Court noted that federal courts have incorporated certain aspects of the Labor Management Relations Act into ERISA. Pursuant to Section 8(a)(1) (29 U.S.C. 158(a)(1)) of the Labor Management Relations Act, an implied threat of discharge is coercive interference as a matter of law. *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 274 n.2 (8th Cir. 1979). Dombrowski directly threatened the Petitioners with the loss of their jobs if they did not transfer the loan proceeds to him. Therefore, by analogy to the Labor Management Relations Act, the Petitioner was coerced as a matter of law.

Assuming, arguendo, that this Court rules that the employees were not coerced, there are still requirements that must be met before a beneficiary may consent to a breach of trust by a trustee with dual loyalties.

The *Restatement (Second) of Trusts*, Sections 216(2) and (3) (1959), provides, in part, that the following elements

must be present before a beneficiary may consent to a breach of trust:

1) the beneficiary was not under any incapacity at the time;

2) the trustee has informed the beneficiary of all of his rights and of the material facts the trustee knew or should have known;

3) the consent was not induced by improper conduct of the trustee; and

4) in situations with a trustee with dual loyalties, the transaction was fair and reasonable.

The foregoing requirements are predicated upon the fiduciary relationship between the parties which imposes a higher standard of care. See *Restatement (Second) of Trusts*, Section 170, Comment w. (1959).

The trustee bears the burden of proof on each of these elements. G. Bogert & G. Bogert, *Law of Trusts and Trustees*, Section 941, p. 457 (2nd Rev. Ed. 1982). Additionally, the fact that the beneficiary requests the act or fails to object, is not consent. *Restatement (Second) of Trusts*, Section 216, Comment a (1959).

The trial court did not find that the trustee informed the Petitioner of his rights, that the trustee informed the Petitioner of the facts that a trustee knew or should have known or that the transaction was fair and reasonable. As this case so adeptly illustrates, these factors are critical. LPC ceased operations two months after it received the loan proceeds. This clearly indicates how serious its financial difficulties were. The Petitioner is a blue collar

employee who had no knowledge of the financial condition of the company, other than Dombrowski's statement regarding the consequences of the failure to consummate the transaction at issue. Accordingly, a thorough investigation would be necessary, assuming the transfer in question could ever be made under the circumstances.

As stated earlier, under common law, the trustee has the burden of proof regarding these elements. The Eighth Circuit, in its decision, held, in effect, that due to the fact that the employees requested the loans in question, they have waived their rights to object. (App. 49). The Eighth Circuit's holding is in direct contravention of common law which states that the mere fact that the beneficiary requests an act is not consent. Also, under common law, the trustee is obliged as part of his fiduciary duty to determine consent. This prevents the use of hindsight to justify actions *Restatement (Second) of Trusts*, Section 174 Comment b (1959) and reinforces the concept that a trustee's duty to a beneficiary is predicated upon his responsibilities as a fiduciary. If a court is permitted to determine which elements of consent (e.g., lack of coercion) may be tacitly present when a trustee has made no formal determination, trustees will not be judged on the basis of their actions. Thus, courts will have usurped the trustee's responsibility and will make their determination on the basis of conjecture, thereby absolving the trustee from any responsibility to justify his actions of record.

But more importantly, there is perhaps no greater threat to the fiduciary relationship than a trustee that acts with dual loyalties. For this reason, courts have not hesitated to intervene; that is, until the Eighth Circuit failed to apply fundamental principles of common law to an

obvious conflict of interest. Intervention by this Court is necessary because the Eighth Circuit has so far departed from the accepted and usual course of judicial proceeding, thereby creating a conflict in the circuits and with decisions of this Court.

II. IT IS ABUSE OF DISCRETION AS A MATTER OF LAW FOR A COURT TO AWARD AN ATTORNEY FEE AGAINST AN ERISA PLAN WITHOUT FOLLOWING A FIVE FACTOR FORMULA

Section 532(g) of ERISA, 29 U.S.C. Section 1132(g)(1) provides, in part, "[i]n any action under this subchapter . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Pursuant to this section, the circuit courts have adopted a five factor formula for determining whether a prevailing party under ERISA is entitled to attorney fees and costs.

The five factors are:

1) the degree of the opposing parties' culpability or bad faith;

2) the ability of the opposing parties to satisfy an award of attorneys' fee;

3) whether an award of attorneys' fees against the opposing party could deter other persons acting under similar circumstances;

4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and

5) the relative merits of the parties' position.[2]

After trial, FirsTier filed a fee application for its entire attorney fee and costs. This fee application included time spent regarding its assertion that it was not a fiduciary for the purposes of ERISA and expert witness fees it incurred that pertained solely to the position that it was not a fiduciary. The trial court awarded FirsTier its entire request pursuant to the Plan. (App. 33)

FirsTier did not file a notice of appeal, but in their appellate brief, they again raised the issue that they were not a fiduciary pursuant to ERISA. (App. 43) They also raised another issue on appeal that the trial court incorrectly ruled that the employees had given sufficient notice to the Secretary of Labor as required by Section 532(h) of ERISA (29 U.S.C. Section 1132h).

The foregoing positions that FirsTier raised on appeal were erroneous as a matter of law because they had not filed a notice of appeal. *United States v. American R. Express Co.*, 265 U.S. 425, 44 S.Ct. 560, 682 L.Ed. 1087

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[2] The test has been adopted in the following circuits: *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986); *Chambless v. Masters, Mates & Pilots Pension Plan*, 815 F.2d 869, 871 (2nd Cir. 1987); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3rd Cir. 1983); *Reinking v. Philadelphia American Life Insurance Co.*, 910 F.2d 1210, 1217-1218 (4th Cir. 1990); *Iron Workers Local #272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980); *Sec'y of Dept. of Labor v. King*, 775 F.2d 666, 669 (6th Cir. 1985); *Leigh v. Engle*, 727 F.2d 113, 139 N.39 (7th Cir. 1984); *Lawrence v. Westerhaus*, 749 F.2d 494 (8th Cir. 1984); *Hammell v. S.E.Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980); *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978); *Andrews v. Employees' Retirement Plan*, 938 F.2d 1245 (11th Cir. 1991).

(1924). After the Eighth Circuit rendered its decision, FirsTier again filed a fee application and included time incurred pertaining to the issues of whether or not it was a fiduciary and whether there had been proper notice. The Eighth Circuit awarded FirsTier its entire fee request of $23,434.70 and did not apply the five factor formula.

In *Franklin v. Thornton*, 983 F.2d 939 (9th Cir. 1993), a plan beneficiary brought an action pertaining to whether the trustee's date of valuation was proper. At trial, the court issued summary judgment in favor of the trustee. It also awarded the trustee an attorney fee pursuant to the Plan and the court did not apply the five factor formula when it made the award.

On appeal, the circuit court reversed. The court held that it was reversible error as a matter of law to award attorney fees without applying the five factor formula. *Id* at 943. This is in complete agreement with the Fourth Circuit which has held that a court must follow the five factor formula because it:

> "provides general guidelines for the district court in determining whether to grant a request for attorneys' fees. (Citation omitted) Requiring district courts to justify the award or denial of attorneys' fees in terms of these five factors allows us some basis for reviewing whether the action was an abuse of discretion." *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1029 (4th Cir. 1993)

In affirming a fee award by a trial court without applying the five factors, a clear split in the circuits has occurred. It is incumbent that this Court issue a writ of

certiorari because the case at hand is a perfect example to indicate the reasons that the factors should be followed.

Probably the most important factors of the five factor formula would be the possible deterent effect of the award and the relative merits of the parties' position.

In *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39 (1987), this Court has invited courts to develop common law rights and duties. Common law followed a doctrine of strict liability for a trustee that acts and then benefits from a transaction in which the trustee had dual loyalties. This doctrine had been adopted by the Eleventh Circuit in *Brown v. Blue Cross*. Additionally, FirsTier repeatedly raised significant issues that were erroneous as a matter of law at trial and at the appellate level. But yet, FirsTier was awarded fees and costs for the foregoing.

By failing to require a court to justify its decision regarding a fee award, the Eighth Circuit has clearly jeopardized the enforcement scheme of ERISA. As this case readily demonstrates, three of the original plaintiffs are not joining in this petition. Widows and blue collar employees simply cannot risk jeopardizing their retirement funds when courts arbitrarily and capriciously take them away. This is particularly acute because their cause of action was predicated upon universally accepted common law principles.

In the Eighth Circuit's holding, the court cites as authority the case of *Leigh v. Engle*, 858 F.2d 361 (7th Cir. 1988) to support its per se award of fees. But immediately after the language quoted from *Leigh*, the Seventh Circuit applied the five factor formula. *Id* at 369. Therefore, *Leigh*

clearly does not stand for the proposition as cited, but for the need to apply an underlying standard in making an award.

Furthermore, the Eighth Circuit's distinction that this was not an "adverse action" but "Plan related duties" simply is not supported by the record. The employees either admitted virtually every allegation contained in FirsTier's complaint or stipulated to the other issues. This is clearly reflected in the lower court's Findings of Fact and Conclusions of Law (App. 13-29) which is devoted almost entirely to the allegations raised by the Petitioner. Furthermore, the employees appealed the court's decision and were the only party to file a notice of appeal. Obviously, the counter claim and appeal involved "plan related duties." But this is inherent in any action alleging a breach of fiduciary duty.

To date, the employees have had a total of $88,347.14 awarded in attorneys' fees and costs against their interests pursuant to a statute that is to be liberally construed to protect their rights. In making these awards, neither the district court nor the appellate court followed precedent that has been adopted by every circuit court. If a court can be so callous and indifferent to the intent of ERISA as the decisions at hand demonstrate, then the enforcement scheme of ERISA is clearly jeopardized. Intervention by this Court is necessary due to the Eighth Circuit's departure from the accepted course of judicial proceedings which has created a conflict between the circuits.

III. A PATTERN OF RACKETEERING THAT LASTS FOR MORE THAN THREE YEARS IS CONTINUOUS

The employees had plead that Anthony Dombrowski had forced one of the employees to borrow from the Plan in 1984 and loan the proceeds to LPC. At the time of this loan until the loans in 1987, Anthony Dombrowski was the plan administrator (App. 3) and, accordingly, was a fiduciary under ERISA. More than three years had expired from the date of the first loan to the date of when FirsTier filed its complaint. Additionally, all of the loans were still outstanding.

The employees alleged in their counter claim and cross claim against FirsTier and Dombrowski that they conspired to violate the Racketeer Influenced Corrupt Organizations Act 18 U.S.C. Section 1961 et seq. This allegation is based on 18 U.S.C. Section 1961(1) which states that embezzlement from a pension plan in violation of 18 U.S.C. Section 664 is a specific predicate act. Courts have held that the definition of embezzlement goes beyond its traditional concepts and "imposes liability for an intentional breach of special fiduciary duties imposed by other regulatory statutes or governing instruments." *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980). Additionally, RICO does not require that the conspirators enter into a formal agreement, a tacit understanding is sufficient. *U.S. v. Hoelscher*, 914 F.2d 1527, 1534 (8th Cir. 1990).

FirsTier filed a motion for summary judgment which was granted by the trial court on the grounds that FirsTier's conduct did not satisfy the continuity requirement

of *H.J. Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In granting the motion, the trial court failed to impute Dombrowski's conduct to FirsTier. This is critical because the employees had plead that Dombrowski and FirsTier conspired to violate RICO. Additionally, the Petitioners plead that when FirsTier was processing the loans, they knew, or should have known, the details of the transaction. Although the trial court found differently (App. 28), the Petitioners had timely demanded a trial by jury. In granting a motion for summary judgment, well plead averments are deemed to be true. A court will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1376 (8th Cir. 1989).

The case at hand illustrates perfectly the need to follow the foregoing principles. Based upon FirsTier's meeting with Dombrowski and their subsequent inaction when the Petitioners borrowed the funds, a finding of fact could be made by a jury that a tacit agreement existed.

Thus, the issue becomes whether Dombrowski's actions established a relationship between the predicate acts and a threat of continuing activity. *H.J. Inc. v. Northwestern Bell Tele. Co., supra,* at 239.

The transactions in question involve virtually identical methods and victims. Therefore, there is an obvious relationship between the acts. There is also a distinct threat of continuing activity because Dombrowski expanded the scope of his second demand for indirect

transfer of funds from the Plan. Additionally, the pattern of racketeering lasted for more than three years because Dombrowski had been in breach of his fiduciary duty for at least three years by virtue of his failure to repay the 1984 loan. Thus, the continuity requirements of *H.J. Inc. v. Northwestern Bell Tele. Co.* have been met and the lower court's dismissal violates this Court's holding. Intervention by this Court is necessary due to the lower court departure.

IV. A BENEFICIARY OF AN ERISA PLAN MUST BE FULLY INFORMED OF HIS RIGHTS BEFORE HE CAN CONSENT TO A BREACH OF TRUST

Assuming arguendo that this Court rules that a conflict of interest did not exist, the Eighth Circuit's holding is still erroneous as a matter of law.[3]

The Eighth Circuit's decision has held in effect that due to the fact that the loans in question were requested by a fiduciary and that the employees acquiesced by virtue of executing the loan documents, the trustee satisfied their fiduciary duty. As authority for this proposition, the Eighth Circuit cites IIA *Scott on Trusts* Section 185 at 574. (App. 47-48).

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[3] The analysis contained in this section is very similar to the analysis regarding consent in Argument I. The distinction is that in a dual loyalty situation, liability is predicated upon a trustee acting if they have dual loyalties. This analysis is based upon whether a trustee knew or should have known a breach of trust was occurring.

The foregoing authority is taken completely out of context and does not reflect the undisputed facts of the case. The entire quote is:

> "Where the holder of the power holds it solely for his own benefit, the trustee can properly comply and is under a duty to comply with his directions, provided that the attempted exercise of the power does not violate the terms of the trust. But where the holder of the power holds it as a fiduciary, the trustee is not justified in complying with his directions if the trustee knows or ought to know that the holder of the power is violating this duty to the beneficiaries as fiduciary in giving the directions. The trustee cannot properly take the position that the responsibility is wholly that of the holder of the power. In such a case the trustee is under a duty similar to that which one trustee owes with respect to his co-trustees. A trustee is not always justified in complying strictly with the terms of the trust."

Id. at 574.

In the case at hand, the holder of the power to direct the trustee was Anthony Dombrowski, a plan fiduciary. Thus, the issue is not whether the employees were requesting the loans, but whether the trustee knew or should have known another co-fiduciary was breaching the trust. In this regard, it would be difficult to imagine a more egregious fact pattern.

Admittedly, the trial court found that FirsTier did not know and should not have known of the transfers. (App. 24). But this finding is a mixed finding of law and fact and courts are not bound if the finding is predicated

upon a misapprehension of the law. *U.S. v. Richberg*, 378 F.2d 523 (5th Cir. 1968). In this regard, if the trustee's conduct in the case at hand meets the high standard of fiduciary conduct imposed under ERISA, then a fiduciary will never breach their duty in a plan participant loan.

However, due to the fact that the employees were not being coerced, the Eighth Circuit refused to determine whether the trustee should have known of the transfer.[4] (App. 49). This view is in direct contravention of common law and the Department of Labor regulations that they cite as authority.

Obviously, any plan participant must be involved with the loan process. But, if a court may use this involvement to per se abrogate the trustee's fiduciary duty, then no fiduciary duty will exist. This view violates the common law principle that the fact that a beneficiary requests the act does not constitute consent. *Restatement (Second) of Trusts*, Section 216 Comment a (1959). This principle is predicated upon the fiduciary duty that exists between the parties. *Restatement (Second) of Trusts*, Section 170, Comment w (1959). But more importantly, before a beneficiary may consent, the trustee is under an affirmative duty to determine that the beneficiary knows "his rights and of the material facts which the trustee knew or should have known." *Restatement (Second) of Trusts*, Section 216(2)(b) (1959).

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[4] The Petitioner incorporate by reference the discussion contained in Section I regarding the fact that they were coerced as a matter of law. As with the discussion regarding the conflict of interest discussion, lack of coercion is just one of the elements required before a beneficiary may consent to a breach of trust.

Thus, it is not the request by the beneficiary that is controlling, but the material facts of the transaction. This is a critical distinction. Otherwise, you will place the cart before the horse and completely abrogate the fiduciary relationship. (See discussion in Section I, infra.)

Furthermore, this view is in complete accord with the Department of Labor's comments to the final regulations governing plan participant loans. 54 Fed. Reg. 30,519-30,530 (1989).

As previously stated, the Eighth Circuit held that based upon these regulations, there must be coercion before a loan can be voided. (App. 49). As with the authority from *Scott on Trusts*, the Eighth Circuit's authority is taken completely out of context.

The preamble does state that a participant that exercises their unfettered discretion may transfer the funds and the loan will be qualified. *Id.* at 30,521. But to interpret this to mean that if there is no coercion, a trustee has no fiduciary duty, is a misnomer.

In the preamble, the Department stated that "the exemption provided by 408(b)(1) provides relief from the prohibited transaction rule of Section 406 of the Act, but not the fiduciary responsibility rules set out in Sections 404 and 405." *Id.* at 30,521.

Section 405(a)(2) of ERISA (29 U.S.C. Section 1105(a)(2)), states that a fiduciary is liable for the breach of fiduciary duty of another fiduciary if they fail to comply with their fiduciary responsibilities as set out by Section 404(a)(1). (29 U.S.C. Section 1104(a)(1)). Section 404 incorporates the reasonable care and skill standard

into the general fiduciary rules of ERISA. As part of the reasonable skill and care standard, common law held that a trustee violated their fiduciary duty if they knew or should have known another trustee was committing a breach of trust and failed to act. *Restatement (Second) of Trusts*, Section 184 (1959). But more importantly, common law incorporates Section 184 into a transaction in which the trustee was at the direction of another co-fiduciary. *Id.*, Section 185, Comment e. Accordingly, the Department of Labor final regulations require a plan participant loan to be approved by an administrator that has fiduciary status. 54 Fed. Reg. 30,520-30,521 (1989). Thus, the Department of Labor's position clearly does not predicate liability upon coercion, but on the "absence of any inappropriate precondition or other facts and circumstances indicating that the loan program is not administered primarily for the benefit of the participants." *Id.* at 30,521. This position is in complete agreement with common law and *Scott on Trusts*.

In the case at hand, FirsTier merely processed the loans. As stated previously in Section I, it was incumbent that FirsTier informed the employees of their rights and the relevant facts. FirsTier bears the burden of proof on these issues. G. Bogert & G. Bogert, *Law of Trusts and Trustees*, Section 941, p. 457 (2nd Rev. Ed. 1982). As a result of FirsTier's failure, the Petitioner is entitled to void the transaction as a matter of law. *Restatement (Second) of Trusts*, Section 205 Comment a (1959).

The Eighth Circuit has clearly eroded the high standards of fiduciary care required by ERISA. Accordingly, intervention of this Court is necessary.

CONCLUSION

One of the universally accepted principles of trust law was that courts did not hesitate to intervene if a trustee failed to avoid a conflict of interest. As a result of the Eighth Circuit's departure from this rule, this Court must intervene. This Court should order a summary disposition, on the merits, of this matter and direct the Eighth Circuit to apply the doctrine of strict liability or, in the alternative, grant this Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Page

A) Memorandum Opinion and Order dated June 15, 1990, *FirsTier Bank N.A. Omaha v. Land Paving Company, et al* .....App. 1

B) Transcript of Findings of Fact and Conclusions of Law, dated December 6, 1991, *FirsTier Bank N.A. Omaha v. Land Paving Company, et al*.....App. 13

C) Order, dated October 14, 1992, *FirsTier Bank N.A. Omaha v. Land Paving Company, et al*..App. 30

D) Entry of Judgment dated October 14, 1992, *FirsTier bank N.A. Omaha v. Land Paving Company, et al* .....App. 36

E) *FirsTier Bank N.A. Omaha v. Zeller,* Eighth Circuit Opinion dated February 16, 1994.....App. 38

F) *FirsTier Bank N.A. Omaha v. Zeller* Order dated April 14, 1994.....App. 54

G) *FirsTier Bank N.A. Omaha v. Zeller* Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc dated April 18, 1994 .....App. 56

18 U.S.C. Section 1961(1).....App. 57

29 U.S.C. Section 158(a)(1) .....App. 57

29 U.S.C. Section 1104(a)(1) .....App. 57

29 U.S.C. Section 1108(b)(1).....App. 58

29 U.S.C. Section 1132(g)(1).....App. 59

29 U.S.C. Section 1132(h) .....App. 59

APPENDIX TABLE OF CONTENTS – Continued

Page

29 U.S.C. Section 1141 ..... App. 60

Restatement (Second) of Trusts, Section 170 Comment W (1959) ..... App. 60

Restatement (Second) of Trusts, Section 174 Comment b ..... App. 61

Restatement (Second) of Trusts, Section 184 .... App. 61

Restatement (Second) of Trusts, Section 185 Comment e ..... App. 61

Restatement (Second) of Trusts, Section 203 .... App. 62

Restatement (Second) of Trusts, Section 205 Comment a ..... App. 62

Restatement (Second) of Trusts, Section 206 .... App. 62

Restatement (Second) of Trusts, Section 216(2).. App. 63

Restatement (Second) of Trusts, Section 216(3).. App. 63

Restatement (Second) of Trusts, Section 216 Comment a ..... App. 63

Portions of the Department of Labor Comments to the final regulations ..... App. 64

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FIRSTIER BANK, N.A., OMAHA, as trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Plaintiff, vs. LAND PAVING COMPANY ANTHONY E. DOMBROWSKI, JAMES R. ZELLER, PATRICIA A. OLSEN, Individually and as Personal Representative of the Estate of Duane H. Olsen, JAMES E. LONERGAN, BRYAN VERCOE, FRANK BOSANEK, EUGENE H. HESS, RICHARD J. O'KONSKY, and PROFIT SHARING PLAN AND EMPLOYEES TRUST OF LAND PAVING COMPANY, Defendants.	CV 89-0-275 (Filed Jun. 15, 1990)
JAMES R. ZELLER, PATRICIA A. OLSEN, Individually and as Personal Representative of the Estate of Duane H. Olsen, JAMES E. LONERGAN, and BRYAN VERCOE, Counter-Plaintiffs, vs. FIRSTIER BANK, N.A., OMAHA, as Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Counter-Defendant.	MEMORANDUM OPINION and ORDER

JAMES R. ZELLER, PATRICIA A. OLSEN, Individually and as Personal Representative of the Estate of Duane H. Olsen, JAMES E. LONERGAN, and BRYAN VERCOE,

Cross-Plaintiffs,

vs.

ANTHONY E. DOMBROWSKI,

Cross-Defendant.

JAMES R. ZELLER, PATRICIA A. OLSEN, Individually and as Personal Representative of the Estate of Duane H. Olsen, JAMES E. LONERGAN, and BRYAN VERCOE,

Third-Party Plaintiffs,

vs.

GEORGE SILENCE and MANAGEMENT CONSULTANT SERVICES, INC.,

Third-Party Defendants.

This matter is before the Court on the motion filed by plaintiff and counter-defendant, Firstier Bank, N.A., Omaha ("Firstier"), for summary judgment on the entire counterclaim, or in the alternative, partial summary judgment on certain claims made within the counterclaim (filing no. 32).

Firstier asserts first that the entire counterclaim should be dismissed because it is based on the theory that Firstier breached its fiduciary duties in making certain

loans to the plan participants, when in fact Firstier did not act as a fiduciary in making the loans.

Second, Firstier asserts that a partial summary judgment should be granted. Firstier asserts that the RICO claim should be dismissed for the reason that the counter-plaintiffs have failed to allege or show sufficient predicate acts to satisfy the pattern requirement of a RICO claim. Firstier also asserts that the claim for breach of fiduciary duties in regard to the making of the loan to James E. Lonergan on February 22, 1984, in the amount of $42,500 should be dismissed for the reason that the statute of limitations had run in regard to this claim and also for the reason that there has been no showing by the counter-plaintiffs that the making of the loan involved any wrongful conduct on the part of Firstier. Finally, Firstier asserts that the counter-plaintiffs' individual claims for relief should be dismissed for the reason that Firstier,if it is liable at all, is only liable to the Plan itself, and not to the individual participants of the Plan.

FACTUAL BACKGROUND

The Profit Sharing Plan and Employees Trust of Land Paving Company, as amended ("Plan") was originally established by Land Paving Company ("Land Paving") in March of 1953, and has subsequently been maintained under the Employee Retirement Income Security Act of 1974. Firstier was the trustee of the Plan pursuant to ERISA. Land Paving was the employer, and Anthony Dombrowski acted as Plan Administrator. The counter-plaintiffs were employees of Land Paving, and are participants in the Plan.

Counter-plaintiff, James E. Lonergan, borrowed $42,500 from the Plan on February 22, 1984. Firstier, at the direction of Land Paving, made the loan on February 22, 1984. These funds were then allegedly loaned by Lonergan to Land Paving to pay a bid rigging fine. Lonergan knew on or before February 22, 1984 that the $42,500 borrowed from the Plan would be loaned to Land Paving for its benefit.

On or about March 27, 1987, Dombrowski, President of Land Paving, notified Firstier that it was being removed as Trustee of the Plan. Firstier refused to surrender the Plan assets.

On April 1, 1987, Firstier was directed by Land Paving to make loans from the Plan to the counter-plaintiffs. Firstier made the loans as directed. The individuals and the amounts of the loans were: Duane H. Olsen – $50,000; James R. Zeller – $24,500; Brian Vercoe – $11,950; and James E. Lonergan – $7,500. These borrowed funds were then allegedly loaned by the counter-plaintiffs to Land Paving.

Firstier filed this action on April 21, 1989, seeking a declaratory judgment to determine, among other questions, Firstier's status with respect to the Plan.

The four Plan participants who borrowed from the Plan filed a counterclaim against Firstier alleging that in making the loans, Firstier had taken part in a scheme, the intent of which was to enable Land Paving to receive money from the Plan and in turn repay its creditor, Firstier. The counter-plaintiffs allege that Firstier's actions constitute a breach of its fiduciary duties and are in violation of 29 U.S.C. §§ 1104(a)(1), 1106(a)(1)(B) and

1106(b)(1)&(2). The counter-plaintiffs also allege that Firstier's actions are a violation of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961, *et seq.*

DISCUSSION

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party should prevail as a matter of law. Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317 (1986). A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). However, the opposing party must be given the benefit of all favorable factual inferences and summary judgment cannot be granted when the non-movant shows that an allegedly undisputed fact actually presents a triable issue. *Holloway v. Lockhart*, 813 F.2d 874, 878 (8th Cir. 1987).

A. Summary Judgment on entire Counterclaim

The Plan at issue in this case states in paragraph 20:

> *Loans to Participants.* The trustee may, and shall *at the direction of the Company,* make a loan or loans to a Participant. . . . .

(emphasis added).

Firstier argues that it made the loans at issue in this case pursuant to the direction of Land Paving in accordance with paragraph 20 of the Plan. In essence, Firstier is arguing that it was directed to make the loans, that it had

no discretion in the matter, and thus, it did not act as a fiduciary and could not have breached any fiduciary duty in making the loans. Firstier argues, then, that since the entire counterclaim is based upon the theory that Firstier breached its fiduciary duties in making the loans from the Plan, the entire counterclaim should be dismissed.

The Court finds that the motion for summary judgment should be denied for the following reasons.

Section 1103(a)(1) of ERISA states in regard to the authority of a plan trustee:

> Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that –
>
> > (1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan *and which are not contrary to this chapter*, . . .

29 U.S.C. § 1103(a)(1) (emphasis added). This provision of ERISA clearly indicates that the trustee is subject to the directions of another fiduciary only when such directions

are not contrary to the Act. When such directions are contrary to the Act, the trustee cannot escape liability. *Fisher v. MacKenzie*, No. C-84-868-JLQ, slip op. (E.D. Wash. Oct. 8, 1985).

In the present situation, under the terms of the Plan Land Paving could direct the trustee to make a loan. Thus, the Court finds that Land Paving was a fiduciary within the meaning of 29 U.S.C. § 1002(21)(A). Under § 1103(a)(1) Firstier, as trustee, would only be subject to this direction if it was made in accordance with the terms of the Plan, and was not contrary to the provisions of ERISA. The counterclaim, cross-claim and evidence submitted by the parties raise a material factual dispute in regard to whether at least some of the loans were directed by Land Paving and carried out by Firstier in accordance with the provisions of ERISA. Thus, summary judgment on the entire counterclaim would not be appropriate.

B. Partial Summary Judgment

1. Lonergan $42,500 Loan

Despite the denial of summary judgment on the entire counterclaim, the Court finds that the counter-plaintiffs have not shown that Firstier breached any fiduciary duty in regard to the $42,500 loan made to James E. Lonergan on February 22, 1984, and thus, the Court finds that partial summary judgment should be granted in favor of Firstier and against the counter-plaintiffs in regard to the claims involving the making of this loan.

Land Paving directed Firstier to loan Lonergan $42,500 from the Plan. The record reflects the following in regard to this loan: Mr. Lonergan knew that the money was supposedly borrowed from the Plan to loan to Land Paving or Dombrowski to pay off Dombrowski's bid rigging fine; Mr. Lonergan neither talked to anyone at Firstier regarding the February 22, 1984 loan nor disclosed the purposes of the borrowing; Firstier had no knowledge of the loan's purposes. This evidence is unrefuted by the counter-plaintiffs. Although the counter-plaintiffs have produced evidence tending to show that Firstier had knowledge of the purposes of the loans made in April of 1987 and that such purposes were improper, they have not produced any evidence tending to show that Firstier had knowledge of the purpose of the $42,500 loan made to Lonergan in 1984, or that the making of the loan was improper. Thus, the Court finds as a matter of law that Firstier has not breached any fiduciary duty in regard to the $42,500 loan.

2. Recovery of Damages

Firstier also argues that the claims for relief under ERISA by the individual counter-plaintiffs should be dismissed for the reason that only the Plan itself may recover under ERISA for the alleged wrongs. The Court agrees that beneficiaries under a plan may not recover individually for violations of fiduciary duties. *Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed.2d 96 (1985). To this extent, any individual claims for relief should be dismissed. However, the Court also concludes that the individual counter-plaintiffs may bring their

claims for breach of fiduciary duties, in order to establish any liability on the part of the trustee for breach of its fiduciary duties, and thus, to establish any obligation the trustee has to restore to the Plan any losses and/or profits as required by 29 U.S.C. § 1109.

3. RICO Claim

In count four of the counterclaim, the counter-plaintiffs allege that Firstier engaged in a pattern of racketeering activity in violation of 18 U.S.C. § 1962.

The essential elements of a 1962 action were set out in *Sedima, S.P.R.I. v. Imrex, Co.*, 473 U.S. 479, 496 (1985). In this case the Supreme Court stated:

> A violation of Section 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity . . . [and] the plaintiff only has standing if, and can recover to the extent that, he has been injured . . . by the conduct constituting the violation.

Additionally, the kind of conduct which meets the pattern requirement of § 1962(c) was set out in *H.J. Inc. v. Northwestern Bell*, 492 U.S. ___, 106 L. Ed.2d 195, 208-210, 109 S. Ct. 2893 (1989). In this case the Supreme Court stated:

> RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.

In regard to the requirement of "continued criminal activity" the Court stated:

> "continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. . . . It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated. . . . .
>
> *Id.*

The Supreme Court provided two methods by which the threat of continuity can be established. First, continuity may be shown by proof of a specific threat of repetition extending indefinitely into the future (such a situation exists when a hoodlum sells "insurance" to neighborhood storekeepers to cover them against breakage of their windows, specifically telling his victims that he will be reappearing each month to collect the "premium" that would continue their "coverage"). Second,

continuity can be demonstrated by proof that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. *Id.*

It is clear to the Court that the allegations in this case do not meet the test for establishing a pattern of racketeering activity. The remaining allegations made in the counterclaim pertain to actions occurring over a period of one or two days, and involve the making of four loans from a single employee benefit plan to four individuals working for the same company. There is no evidence that these acts occurred over a substantial period of time, nor that they pose a threat of continued fraudulent activity.

The counter-plaintiffs argue that they have not as of yet had the benefit of discovery, and thus, they do not know what other predicate acts may have transpired. The Court concludes, however, that under the Federal Rules of Civil Procedure, a plaintiff should not be allowed to file a baseless lawsuit and then be allowed to proceed on the matter in hopes that he will be able to state a claim after having the benefit of discovery.

The Court concludes that the Rico claim should be dismissed.

CONCLUSION

For the reasons stated above,

IT IS HEREBY ORDERED:

1. Firstier's motion for summary judgment on the entire counterclaim is denied;

2. Firstier's motion for partial summary judgment is granted as follows:

a. The motion for partial summary judgment is granted in so far as it relates to the entire Rico claim (Count Four), and the RICO claim is dismissed;

b. The motion for partial summary judgment is granted in so far as it relates to the claims brought under ERISA for breach of fiduciary duties, but only regarding the $42,500 loan made to Lonergan in 1984, and any claims pertaining to the $42,500 loan are dismissed; and

c. The motion for partial summary judgment is granted in so far as it relates to the personal claims for relief by the individual counter-plaintiffs, and such personal claims for relief are dismissed. By this decision, the Court does not intend to deny the counter-plaintiffs the right to claim that Firstier is liable for breach of fiduciary duties.

In all other respects the motion for partial summary judgment is denied.

Dated this 15 day of June, 1990.

BY THE COURT:

/s/ Wm. G. Cambridge
WILLIAM G. CAMBRIDGE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

FIRSTIER BANK, N.A., OMAHA, as Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company,	) CV 89-0-275
Plaintiff,	) TRANSCRIPT
vs.	) OF FINDINGS
LAND PAVING COMPANY, ANTHONY E. DOMBROWSKI, JAMES R. ZELLER, et al.,	) OF FACT AND
Defendants.	) CONCLUSIONS
	) OF LAW

OFFICIAL
TRANSCRIPT OF PROCEEDINGS

BEFORE: THE HONORABLE WILLIAM G. CAMBRIDGE, District Judge, Omaha, Nebraska, December 6, 1991.

APPEARANCES:

WILLIAM JAY RILEY	for Plaintiff and Counterclaim-Defendant FirsTier Bank, N.A., Omaha.
D. C. BRADFORD	for Third-Party Defendant George Silence and Management Consultant Services, Inc.
JAMES E. BACHMAN	for Defendants and Counterclaim-Plaintiffs James R. Zeller, Patricia A. Olsen, James E. Lonergan and Bryan Vercoe

PEGGY CASPER, C.S.R.
OFFICIAL COURT REPORTER
U.S. DISTRICT COURT
FEDERAL BUILDING
P.O. BOX 1278, OMAHA, NE 68101

(IN OPEN COURT)

December 6, 1991
6:25 p.m.

THE COURT: The following constitutes my findings of fact and conclusions of law in this case. My findings of fact so made are made upon the basis of having been proved by the standard of proof of the greater weight of the evidence. I reserve the right in the event of an appeal to amend or supplement these findings of fact and conclusions of law which are, of course, being announced here tonight from the bench following the close of the evidence and the arguments of the parties.

1. This Court has jurisdiction over the subject matter and over the parties pursuant to 29 U.S.C. Section 1132 (e) (1), and venue is proper in Nebraska, pursuant to 29 U.S.C. Section 1132 (a) (2).

2. Land Paving Company was a Nebraska corporation doing business in Nebraska.

3. Anthony E. Dombrowski was the president, Duane H. Olsen was the vice president, and James H. Lonergan, Bryan Vercoe and James R. Zeller were employees of Land Paving Company.

4. All of the individuals mentioned in Paragraph 3 were participants in the Profit Sharing Plan and

Employees Trust of Land Paving Company. FirsTier Bank, N. A., or its predecessor, has been trustee of the plan from its inception.

5. Throughout these findings and conclusions Land Paving Company will be referred to as that, Land Paving Company, or sometimes as LPC or sometimes as the employer. Anthony E. Dombrowski will be referred to as such and on occasions as just Dombrowski. Duane H. Olsen will be referred to as Olsen at times or as in his full name as will James H. Lonergan, Bryan Vercoe and James R. Zeller, either in their full names or as, respectively, Lonergan, Vercoe and Zeller. FirsTier Bank will be referred to throughout these findings and conclusions as such in that name or as the Trustee, and the Profit Sharing Plan in this case will be referred to such or as simply the Plan throughout these findings and conclusions.

6. Land Paving Company and Anthony E. Dombrowski were parties of interest for the purposes of 29 U.S.C. Section 1002(14).

7. In 1984, Dombrowski, Olsen and Lonergan borrowed from the Plan Fifty Thousand Dollars ($50,000.00), Fifty Thousand Dollars ($50,000.00), and Forty-Two Thousand Five Hundred Dollars ($42,500.00), respectively. In 1985, Olsen repaid his loan in full. The Dombrowski and Lonergan loans were outstanding and past due in the spring of 1987 and have never been repaid.

8. At all times relevant here, Stanley Traub was a vice president and the manager of the Employee Benefit Trust Department of FirsTier and Thomas Moore was an executive vice-president and in charge of the Estate and

Trust Division of FirsTier. Mr. Moore was Stanley Traub's supervisor.

9. During the early part of 1987, Land Paving Company retained the services of Management Consultant Services, Inc., a Nebraska corporation solely owned by George Silence. One of the duties of Management Consultant Services was to assist Land Paving Company in obtaining long-term financing.

10. On or about March 27, 1987, Stanley Traub received from Land Paving Company a copy of a corporate resolution and a copy of an executed Successor Trustee Acceptance signed by Mr. Dombrowski accepting the duties of Trustee of the Plan which purported to remove FirsTier as Trustee of the Plan.

11. On or shortly after March 27, 1987, Mr. Traub informed Mr. Dombrowski that FirsTier would not accept the removal as Trustee.

12. On April 1, 1987, Stanley Traub received two letters signed by Mr. Dombrowski directing FirsTier to make the following loans from the Plan to the following Plan participants: Duane Olsen, $50,000.00; James Zeller, $24,500.00; Bryan Vercoe, $11,950.00; James Lonergan $7,500.00.

13. Mr. Traub informed Mr. Moore of these requests, and after a review of the requests and the Plan, FirsTier made the loans to the above-listed individuals in the amounts listed. When these loans were made, FirsTier did not ask the Plan participants or inquire of anyone else what was the purpose of the loans.

14. On June 30, 1987, Land Paving Company filed a Chapter 11 bankruptcy proceeding. The company has been inactive for two years, but the bankruptcy remains open. The loans to the Plan participants have never been repaid.

This is not 15, but I want the record to reflect that I have already indicated I reserve, as I have, the right to amend these, and especially is that so, although not more so, but it is so, with respect that there could be, in announcing these from the bench, some repetition of certain findings, and I apologize for that, but when you announce a decision from the bench, you are doing it under circumstances that don't lend themselves to the very best composition. Going on now to finding 15.

15. On April 21, 1989, FirsTier Bank, as Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, filed a Complaint for Declaratory Judgment determining its status under the Plan. Certain participants in the plan, James R. Zeller, Patricia A. Olsen, individually, and as personal representative of the Estate of Duane H. Olsen, James E. Lonergan and Bryan Vercoe, answered and filed a Counterclaim against FirsTier alleging several causes against FirsTier to recover for loans made by FirsTier to these participants on or about April 2, 1987, totaling $93,950.00. After a partial summary judgment was entered for FirsTier, the remaining causes in the Counterclaim are based upon the Employee Retirement Income Security Act of 1974, which throughout the balance of these findings and conclusions may be referred to as such or may simply be referred to as ERISA.

16. The Plan was originally established by Land Paving Company on March 19, 1953, and FirsTier, through its predecessor Omaha National Bank, has been the Trustee since the Plan's inception.

17. LPC was a Nebraska corporation doing business in Nebraska. On June 30, 1987, LPC filed a Chapter 11 Bankruptcy proceeding and the company has been inactive for more than two years.

18. In 1987, Anthony Dombrowski was the President of LPC, Duane H. Olsen was a Vice President of LPC, and James H. Lonergan, Bryan Vercoe and James R. Zeller were employees of LPC. All were participants in the Plan, and Anthony Dombrowski operated as Plan Administrator.

19. Stanley Traub was a Vice President and the Manager of the Employee Benefits Trust Department of FirsTier at all times relevant here and was the bank officer in charge of this Plan for FirsTier. Thomas Moore was an Executive Vice President and in charge of the Estate and Trust Division of FirsTier, and Mr. Moore was Mr. Traub's supervisor.

20. During the early part of 1987, LPC retained the services of Management Consultant Services, Inc., a Nebraska corporation, solely owned by George Silence. One of the duties of Management Consultant Services was to assist LPC in obtaining long-term financing.

21. On March 27, 1987, Stanley Traub received from LPC a copy of a corporate resolution and a copy of an executed Successor Trustee Acceptance signed by Anthony Dombrowski accepting the duties of trustee of

the Plan which documents purported to remove FirsTier as Trustee of the Plan. On or shortly after March 27, 1987, Mr. Traub informed Mr. Dombrowski that FirsTier would not accept any removal as trustee until the new trustee had obtained a bond as required by ERISA. No bond was presented to Mr. Traub, and nothing further occurred with respect to the attempted removal of FirsTier as Trustee.

22. On April 1, 1987, Stanley Traub received two letters signed by Anthony Dombrowski directing FirsTier to make loans from the Plan to the following Plan participants in these amounts: Duane Olsen, $50,000.00; James Zeller, $24,500.00; Bryan Vercoe, $11,950.00; James Lonergan, $7,500.00.

23. Section 20 of the Plan refers to loans to Plan participants as directed by the Company stating: " * * * the trustee may, and shall at the direction of the company, make a loan or loans to a participant."

24. Mr. Traub informed Thomas Moore of these requests and after a review of the requests and the Plan, FirsTier made the loans to these participants in the amounts directed.

25. When these loans were made, FirsTier did not ask the Plan participants or inquire of anyone else what was the purpose of the loans. FirsTier did not know why the Plan participants wanted the loans.

26. Bryan Vercoe signed the signature of Zeller's wife to a spousal consent form so that Zeller could obtain his loan.

27. The participants, in turn, loaned the proceeds of the Plan loans to Anthony Dombrowski and to LPC. These proceeds were used by LPC to make a payment by LPC to FirsTier on outstanding loans which were due from LPC to FirsTier.

28. FirsTier's trust department did not know the purpose or use of the Plan loan proceeds, and FirsTier's loan department did not know the source of the credit loan payments from LPC to FirsTier.

29. The participants contend they borrowed the money from the Plan under the threat from Anthony Dombrowski that they would otherwise lose their jobs with LPC. FirsTier was not aware of this alleged threat by Mr. Dombrowski to the employees.

30. The employees were not in fact threatened or coerced by either Mr. Dombrowski or by anyone else into borrowing the money from the plan or into loaning it to Anthony Dombrowski and LPC but they both so borrowed the money and so loaned it voluntarily and freely.

31. FirsTier was not properly removed as trustee by Mr. Dombrowski or LPC under the Plan or under ERISA, and FirsTier is still the Trustee of the Plan.

32. By retaining authority to direct the Trustee to make participant loans, LPC was a named fiduciary with respect to the Plan.

33. The direction to loan the funds to the individual participants on April 1, 1987, was in accordance with the Plan and with ERISA. ERISA requires a trustee to follow the directions of a named fiduciary if the plan so provides and if the directions do not clearly disclose on their face

or the trustee does not know or the trustee should not have known that the directions are contrary to the Plan or ERISA.

34. The directions and the information available to FirsTier did not clearly or otherwise indicate that FirsTier's issuance of the loans would be prohibited by the Plan or ERISA. In making the loans to the participants, FirsTier did not violate the Plan or ERISA and is not liable to these participants for their loans.

35. As a directed Trustee, FirsTier did not have any obligation or responsibility under the Plan or under ERISA under the facts of this particular case to investigate or to inquire into the purposes of the loans to determine what the participants would do with the funds, and it did not have any duty to monitor the use of the loan proceeds.

36. FirsTier is still the Trustee of the Plan.

37. An order should not be entered at this time designating a successor trustee and discharging FirsTier and releasing FirsTier from any liabilities to the defendants.

38. A judgment should not be entered at this time determining the amount of and the date for distribution of the individual defendant's accrued benefits under the Plan.

39. FirsTier did not violate Section 404 or Section 406 of ERISA by making the subject April 1, 1987, or April 2, 1987, directed participant loans.

40. Stan Traub did not participate in a conference call on or about April 1, 1987, with Bryan Vercoe, James

Zeller, Gerald Bofenkamp and other Plan participants during which he was informed of and discussed the borrowing of money from the Plan, loaning the money to Land Paving Company, and repayment of a line of credit to FirsTier.

41. In connection with the loans FirsTier discharged its duties under 29 U.S.C. Section 1104, specifically the duties with respect to the Plan, solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and in accordance with the documents and instruments governing the Plan and with ERISA.

42. FirsTier was a fiduciary within the meaning of 29 U.S.C. Section 1002(21) (A) when the Plan participants borrowed from the Plan to the extent of the duties imposed upon FirsTier under 29 U.S.C. Section 1108 (b) (1), that is to say, the fiduciary duties to ensure that the loans were made in accordance with 1108 (b) (1) which are to ensure that any loans made by the Plan to parties in interest who are participants or beneficiaries of the plan are available to all such participants and beneficiaries on a reasonably equivalent basis, are not made available to highly compensated employees, officers, or shareholders in an amount greater than the amount made available to other employees, are made in accordance with specific provisions regarding such loans set forth in

the plan, bear a reasonable rate of interest, and are adequately secured.

FirsTier was a fiduciary within the meaning of 29 U.S.C. 1002 (21) (A) when the Plan participants borrowed from the Plan to the extent of duties imposed upon FirsTier under 29 U.S.C. Section 1106, which is to say that FirsTier did not with respect to the Plan in this case cause the Plan to engage in a transaction either knowing or under circumstances where it should have known that such transaction constituted a direct or indirect lending of money or other extension of credit between the Plan and a party in interest.

In other words, I am specifically finding that FirsTier was a fiduciary in connection with these participant loans to the extent that it had duties so imposed upon it under both the trust and ERISA, and I find that those duties of FirsTier under the Plan and ERISA were basically as follows: First, to honor the request or the demand or the notice of LPC to make such loans. It also had the fiduciary duty under 29 U.S.C. Section 1108 to ensure that the loans were in compliance with that Section, and I have already found that they did. And then they further had, in my opinion, and I so find, a fiduciary responsibility not to engage in a transaction which constitutes a direct or indirect lending of money or other extension of credit between the Plan and a party at interest when they know that that is the case or when they have that fiduciary duty not to do that if they know that that is the case or should have known that that is the case. So I specifically find their fiduciary duties don't terminate upon a direction by LPC that these loans are to be made. They still have fiduciary duties to the extent that they are imposed upon

them, as I said, under either the Plan or the law. I find that those are the duties that were imposed upon them, and I now find that they did fulfill all of those duties.

43. FirsTier did not know and should not have known under the facts and circumstances of this case that the Plan loans constituted indirect lending of money or other extension of credit between the Plan and the party in interest.

44. FirsTier did not know and should not have known under the facts and circumstances in this case that the Plan loans constituted indirect transfers to or use by or for the benefit of a party in interest of any assets of the Plan.

45. A Plan trustee is not required to make a thorough investigation when a Plan participant borrows under a Plan such as this when the employer as a fiduciary has the right to and does under the Plan direct it when the Plan as it does in this case says that the trustee shall make the loan and when the papers that are submitted do not clearly show any violation of either the Plan or the law (ERISA), and when the trustee has no knowledge or under the circumstances should not have known that there was any violation of the law, specifically in this instance a purported indirect loan to the employer, not only a loan to the employer but a loan to the employer under coercion and duress which would also be required in order for any such loan to be illegal under the circumstances and facts of this case.

In other words, what I am saying is that a trustee is not relieved of fiduciary duties when you have a plan such as this under which it must make the loan. It still

has certain fiduciary duties, as I have heretofore said, to carry out in connection with that loan which it must make, and if it carries those fiduciary duties out, as I have said that FirsTier has here, and it has no knowledge of any illegality, and shouldn't under the facts and the circumstances, have knowledge of any such illegality, then it has fulfilled in whole its fiduciary duties.

On the other hand, a trustee if it knows, under the facts and circumstances of this case and the Plan and the law in this case, if FirsTier had known or should have known under the facts and circumstances, that these funds were going to be loaned by the participants to the employer under coercion and duress, then the Trustee would have a fiduciary and a duty under the law to not permit it to happen. And that to me explains all this purported difference, and I really don't think there is any, in the legislative history that has been submitted, and which I don't feel has to be considered here because I don't think the law is ambiguous, and we look to that history only when the law is ambiguous, and I think that my explanation here of the duties of FirsTier in this case resolves all these purported issues of the law and the legislative history and the regulations that have been brought up in this case to try to create a problem with respect to what the law is.

46. George Silence was not a fiduciary within the meaning of 29 U.S.C. Section 1002 (21) (A) when the Plan participants borrowed from the Plan.

47. George Silence did not know that the Plan loans constituted an indirect lending of money or other extension of credit between the Plan and a party of interest and he did not assist in this process.

48. George Silence did not know that the Plan loans constituted an indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the Plan and he did not assist in the process.

49. George Silence is not liable as a third party for the alleged violation of Section 404 or Section 406 of ERISA.

50. The Counterclaim-Plaintiffs are not entitled to damages or other equitable relief.

51. The Third-Party Plaintiffs have failed to prove with regard to the Plan participant loans in question that either Management Consultant Services, Inc., or George N. Silence acted as a fiduciary of the Profit Sharing Plan and Employees Trust of Land Paving Company under 29 U.S.C. Section 1002 (21) (A) in that they specifically failed to prove that either Defendant:

(a) Exercised any discretionary authority or discretionary control respecting management of the Plan or exercise any authority or control respecting management or disposition of its assets.

(b) Rendered investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of the Plan, or had any authority or responsibility to do so.

(c) Had any discretionary authority or discretionary responsibility in the administration of the Plan.

52. With regard to the Plan participant loans in question, neither Management Consultant Services, Inc., or George N. Silence had any duty to the Third-Party Plaintiffs to learn of and/or prevent the Plan participant loans in question.

53. With regard to the Plan participant loans in question neither Management Consultant Services, Inc., or George N. Silence acted in violation of 29 U.S.C. Section 1104.

54. With regard to the Plan participant loans in question neither Management Consultant Services, Inc., or George N. Silence acted in violation of 29 U.S.C. Section 1106.

Rule 11 of the Federal Rules of Civil Procedure provides that the signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Said Rule 11 further provides that if a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of

the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

I find that the Third-Party Complaints filed in this case against the Third-Party Defendants, Management Consultant Services, Inc., and George N. Silence, and the pretrial conference order, were both signed in violation of Rule 11, and I feel I must in accordance then with that rule, impose upon the Third-Party Plaintiffs, those being the same as the Counterclaim Defendants, and upon their attorney, Mr. Bachman, an appropriate sanction, which in this case is going to be reasonable expenses for these defendants incurred because of the filing of those pleadings including reasonable attorneys' fees.

I direct, Mr. Bradford, that you get that affidavit on file within a week from today. Counsel for the Third-Party Plaintiffs and for himself will have seven days thereafter to get their objections on file with respect to them. I do intend to award attorney's fees and costs to the Third-Party Defendants George N. Silence and Management Consultant Services, Inc.

With respect to FirsTier's request to recover reasonable attorneys' fees and costs, pursuant to Section 10.i of the Plan and Section 408(c)(2), it ie [sic] ordered that FirsTier shall submit to this Court within seven days from date hereof its motion with supporting affidavits on the amount of those attorneys' fees, and again, the Defendants and Counterclaim-Plaintiffs will have, through Mr. Bachman, their attorney, seven days thereafter to submit objections with respect to those fees, and of course any evidence in the way of the form of an affidavit or affidavits in connection therewith. All counsel shall do that.

It is the further order of the Court that FirsTier shall remain as Trustee of this Plan until its trusteeship is terminated in accordance with either the Plan or the law or agreement by all of the parties involved.

Those constitute my findings and conclusions of law in this case.

Is there anything further to come before the Court in connection with this matter?

MR. RILEY: FirsTier has nothing, Your Honor.

MR. BRADFORD: I have nothing, Your Honor.

MR. BACHMAN: I have nothing, Your Honor.

THE COURT: Alright [sic], you are all excused.

MR. BRADFORD: Thank you, Your Honor.

MR. RILEY: Thank you, Your Honor.

7:20 p.m.

(END OF THESE PROCEEDINGS)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FIRSTIER BANK, N.A., OMAHA, as Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Plaintiff, vs. LAND PAVING COMPANY, ANTHONY E. DOMBROWSKI, JAMES R. ZELLER, PATRICIA A. OLSEN, Individually, and as Personal Representative of the Estate of Duane E. Olsen, JAMES E. LONERGAN, BRYAN VERCOE, FRANK BOSANEK, EUGENE H. HESS, RICHARD J. O'KONSKY, and PROFIT SHARING PLAN AND EMPLOYEES TRUST OF LAND PAVING COMPANY, Defendants.	CV 89-0-275 **ORDER** (Filed Oct. 14, 1992)
JAMES R. ZELLER, PATRICIA A. OLSEN, Individually, and as Personal Representative of the Estate of Duane H. Olsen, JAMES E. LONGERGAN, and BRYAN VERCOE, Counter-Plaintiffs, v. FIRSTIER BANK, N.A., OMAHA, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Counter-Defendants.	

THIS MATTER is before the Court upon applications for attorney fees and expenses by the plaintiff in this action, FirsTier Bank, N.A., Omaha, to recover attorney fees and expenses (Filing No. 143), and by the third-party defendants, George Silence and Management Consultant Services, Inc. (Filing No. 139). After careful consideration, the Court finds that the requested fees and expenses should be awarded.

I. FIRSTIER BANK

FirsTier Bank seeks to recover its fees and expenses pursuant to this Court's order at the close of trial, pursuant to a provision of the Land Paving Company's Profit Sharing and Employees' Trust Plan, and pursuant to the Employee Retirement Income Security Act ("ERISA").

The Profit Sharing and Employees Trust plan expressly provides recovery of such expenses by a trustee in a case such as this. *See* ¶ 10i:

> The Trustee shall have a lien upon the trust funds for any costs, attorneys fees, and other expenses incurred as a result of any suit or proceeding regarding the trust fund to which the Trustee is a party or is reasonably required to take the action, except where it is finally determined that the Trustee has breached its duties. . . .

Such a provision is authorized by ERISA. *See* 29 U.S.C. § 1108(c)(2), § 408(c) of ERISA. This Court expressly found that FirsTier was entitled to recover under the Plan and under ERISA.

The defendants' objections to recovery by FirsTier (Filing No. 144) are denied. The Court notes that FirsTier, in its status as Trustee and as counter-defendant, was compelled to defendant itself against charges by the defendants in their role as counter-plaintiffs. In such a situation, reimbursement is appropriate. *Cf. Leigh v. Engle*, 858 F.2d 361, 369 (7th Cir. 1988), *cert. denied sub nom. Estate of Johnson v. Engle*, 489 U.S. 1078 (1989):

> The trust instruments allow for reimbursement of fees. . . . The only real question is whether the trust provisions conflict with ERISA. They do not. While an award of fees to a losing defendant certainly would contravene Congress' intent . . . plaintiffs point us to no statutory or common law basis for denying fees to a *prevailing* trustee where the trust documents specifically contemplate such reimbursement.
>
> Plaintiffs argue that this result unjustly deprives the beneficiaries of their funds. We sympathize, to the extent that plaintiffs think it is disgraceful for pensioners to be deprived of their benefits because of . . . seemingly endless litigation. . . . Defendants *prevailed* as to most of the claims. . . . Very few people would become plan administrators if subjected to such unjust, extensive potential costs. Reimbursement here conformed with the trust documents and ERISA.

(emphasis in original) This Court similarly finds that reimbursement is appropriate in this case. FirsTier was required to, and successfully did,[1] defend itself in its role as trust administrator.

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[1] The assertion by the defendants/counter-plaintiffs that "FirsTier's entire defense was erroneous as a matter of law",

FirsTier has submitted affidavits and supporting materials (Filings No. 141 and 142) demonstrating attorney fees in the amount of $58,957.00 and expenses in the amount of $5,955.44. The Court has examined these materials, and finds these expenses and fees to be reasonable and necessarily incurred. Accordingly, the Court finds that FirsTier Bank, N.A. Omaha is entitled to recover, from the trust fund, attorney fees and expenses in the amount of $64,912.44.

II. GEORGE SILENCE AND MANAGEMENT CONSULTANT SERVICES, INC.

This Court expressly found that the third-party complaints filed by James R. Zeller, Patricia A. Olsen, James E. Lonergan, and Bryan Vercoe, against the third-party defendants, George N. Silence and Management Consultant Services, Inc. ("MCS") were signed in violation of Rule 11 of the Federal Rules of Civil Procedure, which provides that such complaints must be "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."

Having considered the briefs and supporting materials proffered by the defendants/third-party plaintiffs, the Court nonetheless affirms its finding that the third-party complaints against Silence and MCS were not well-founded in fact and that sanctions, in the form of an award of attorney fees and expenses, are appropriate. The

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Filing 144 at 2, is simply contrary to this Court's Conclusion of Law.

objections contained in Filings No. 144, 145, and 146 are therefore denied.

The attorney for Silence and MCS has submitted, per this Court's order, an affidavit setting out fees and expenses totalling $8,627.60 (Filing No. 139). The Court has examined these materials, and finds these expenses and fees to be reasonable and necessarily incurred. Accordingly, the Court finds that George N. Silence and Management Consultant Services, Inc. are entitled to recover, from James R. Zeller, Patricia Olsen, James E. Lonergan, and Bryan Vercoe, and from their attorney, James E. Bachman, attorney fees and expenses in the amount of $8,627.60.

IT IS THEREFORE ORDERED that:

(1) the motion by FirsTier Bank, N.A. Omaha, for an award of attorney fees and expenses (Filing No. 143) is granted;

(2) the objections to the awarding of fees and expenses (Filings No. 144, 145, and 146) are denied;

(3) attorney fees and expenses are awarded to Firs-Tier Bank, N.A., Omaha, from the Land Paving Company Profit Sharing Plan and Employees Trust, in the amount of $64,912.44;

(4) attorney fees and expenses are awarded to George N. Silence and Management Consultant Services, Inc., from James R. Zeller, Patricia A. Olsen, James E. Longergan [sic], and Bryan Vercoe, and their attorney, James E. Bachman, in the amount of $8,627.60.

DATED this 14 day of October, 1992.

BY THE COURT:

/s/ Wm. G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FIRSTIER BANK, N.A., OMAHA, as Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Plaintiff, vs. LAND PAVING COMPANY, ANTHONY E. DOMBROWSKI, JAMES R. ZELLER, PATRICIA A. OLSEN, Individually, and as Personal Representative of the Estate of Duane E. Olsen, JAMES E. LONERGAN, BRYAN VERCOE, FRANK BOSANEK, EUGENE H. HESS, RICHARD J. O'KONSKY, and PROFIT SHARING PLAN AND EMPLOYEES TRUST OF LAND PAVING COMPANY, Defendants.	CV 89-0-275 **ENTRY OF JUDGMENT** (Filed Oct. 14, 1992)
JAMES R. ZELLER, PATRICIA A. OLSEN, Individually, and as Personal Representative of the Estate of Duane H. Olsen, JAMES E. LONGERGAN [sic], and BRYAN VERCOE, Counter-Plaintiffs, v. FIRSTIER BANK, N.A., OMAHA, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Counter-Defendants.	

IN ACCORDANCE WITH the Findings of Fact and Conclusions of Law made by this Court on December 6, 1991, the Clerk of the Court is hereby ordered to enter judgment in favor of the plaintiff and cross-defendant FirsTier Bank, N.A., Omaha, and in favor of the third-party defendants George N. Silence and Management Consultant Services, Inc.

IT IS SO ORDERED.

DATED this 14 day of October, 1992.

BY THE COURT:

/s/ W. G. Cambridge
WILLIAM G. CAMBRIDGE,
United States District Court

No. 92-3595

FirsTier Bank, N.A., Omaha, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, Plaintiff-Appellee, v. James R. Zeller; Patricia A. Olsen, Individually and as Personal Representative of the Estate of Duane H. Olsen; James E. Lonergan; Bryan Vercoe, Defendants-Third Party Plaintiffs-Appellants, Land Paving Company; Anthony E. Dombrowski; Frank Bosanek; Eugene H. Hess; Richard J. O'Konsky; Profit Sharing Plan and Employees Trust of Land Paving Company, Defendants, v. George N. Silence; Management Consultant Services, Inc., Third Party Defendants-Appellees, and James E. Bachman, Appellant.	*	Appeal from the United States District Court for the District of Nebraska.

Submitted: September 16, 1993
Filed: February 16, 1994

Before FAGG, BOWMAN, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

This appeal requires us to define the fiduciary duties of an ERISA[1] plan trustee in carrying out an employer's direction to make loans to plan participants that are exempt from some ERISA prohibitions under 29 U.S.C. § 1108(b)(1). We agree with the district court[2] that the trustee retains certain fiduciary duties that were not violated by appellee FirsTier Bank, N.A., in this case. Accordingly, except for a Rule 11 sanction, we affirm.

I. Background.

Appellants James Zeller, Patricia Olsen, James Lonergan, and Bryan Vercoe, who will be referred to in this opinion as the "Participants," are former employees of bankrupt Land Paving Company ("LPC") and participants in and beneficiaries of LPC's Profit Sharing Plan and Employees Trust (the "Plan"). LPC has had a profit sharing plan since 1953. The current Plan, adopted in

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[1] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461.

[2] The HONORABLE WILLIAM G. CAMBRIDGE, United States District Judge for the District of Nebraska.

1984, named FirsTier's predecessor, Omaha National Bank, trustee of the Plan assets.

In December 1986, LPC was deeply in debt, primarily to FirsTier, and in a precarious financial condition. Its president, Anthony Dombrowski, retained appellees George Silence and his firm, Management Consultant Services, Inc. (collectively "Silence"), as financial consultants. Silence advised that LPC needed to obtain new financing for the 1987 asphalt paving season; this required finding sources of cash to meet FirsTier's demand for a $600,000 debt repayment by March 31, 1987.

Dombrowski expected to raise $500,000 by collecting LPC receivables and selling patent rights, but that left a $100,000 shortfall. On March 27, Dombrowski had LPC's Board resolve to substitute Dombrowski for FirsTier as trustee of the Plan, intending to free up cash by funding the existing Plan accounts with annuities. However, Stanley A. Traub, Vice President of FirsTier's Trust Department, advised Dombrowski that the annuity proposal was impermissible. Traub also refused to accept FirsTier's removal as Plan trustee because he knew of LPC's heavy indebtedness and feared misuse of Plan assets. Traub explained to Dombrowski that the proposed successor trustee was not properly bonded under ERISA. *See* 29 U.S.C. § 1112.

A few days later, Dombrowski met with the Participants and persuaded them that the company would close its doors unless they borrowed from their individual Plan accounts and reloaned the proceeds to LPC for the purpose of paying down LPC's debt to FirsTier. On April 2, 1987, Dombrowski as Plan Administrator wrote Traub,

directing FirsTier to make loans to each Participant pursuant to paragraph 20 of the Plan, which provides that "[t]he Trustee may, and shall at the direction of the Company, make a loan or loans to a Participant." FirsTier promptly prepared loan documents, obtained the Participants' signatures on installment notes secured by their interests in the Plan, and disbursed loan proceeds totaling $93,950 to the individual Participants.

The Participants transferred the loan proceeds to Dombrowski's personal account at another bank, receiving promissory notes from LPC and Dombrowski in return. Dombrowski then wrote a $240,000 check on this account to LPC, which used the money to fund part of its March 31 loan payment to FirsTier and to pay Silence's consulting fee. LPC went into bankruptcy in June 1987 and its operating assets were sold. Both the Plan's loans to the Participants and their loans to LPC and Dombrowski remain unpaid.

FirsTier commenced this action in 1989, seeking a declaration of its status with respect to the Plan. The Participants asserted counterclaims and third-party claims against FirsTier, Silence, and Dombrowski, alleging that they violated ERISA and RICO by knowingly making or permitting improper plan participant loans. Dombrowski defaulted and testified on behalf of the Participants at trial.

The district court dismissed the Participants' RICO claims and tried their ERISA claims and FirsTier's declaratory judgment claim to the court. The court found that LPC's direction to FirsTier and the subsequent loans of

Plan assets to the Participants were proper under paragraph 20 of the Plan and ERISA; that FirsTier did not know the Participants would immediately lend the loan proceeds to LPC at the request of Dombrowski; and that FirsTier did not know that the participant loans funded a portion of LPC's March 31 loan payment to the bank. Based upon these findings,[3] the court concluded that FirsTier had not violated its fiduciary duties under ERISA. It declared that FirsTier was still the Plan trustee and awarded FirsTier $64,912.44 in attorneys' fees and expenses from the Plan, as authorized by the Plan. *See* 29 U.S.C. § 1108(c)(2).

The district court also dismissed the Participants' claims against Silence based on its findings that Silence did not act as a Plan fiduciary, and was unaware of Dombrowski's scheme to use the proceeds of the plan participant loans to repay LPC's bank debts. It awarded Silence his fees and expenses as a Rule 11 sanction against the Participants and their attorney, James E. Bachman, because the third-party complaint was "not well-grounded in fact."

The Participants raise numerous issues on appeal, only four of which require discussion: (1) whether FirsTier breached its ERISA fiduciary duties in lending Plan

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[3] The district court announced its detailed findings and conclusions from the bench. *See* Fed. R. Civ. P. 52(a). The Participants argue that the court abused its discretion in not finding additional facts favorable to the Participants. This contention is frivolous. The trial court "only must formulate findings on the ultimate facts necessary to reach a decision." *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 808 (8th Cir. 1976).

assets to the Participants; (2) whether FirsTier is entitled to its fees and expenses from the Plan; (3) whether the ERISA claim against Silence was properly dismissed; and 4) whether the Rule 11 monetary sanction should be upheld. We affirm all but the Rule 11 sanction.

II. FirsTier's Alleged Breach of Fiduciary Duty.

"Borrowing from trust law, ERISA imposes high standards of fiduciary duty upon those responsible for administering an ERISA plan and investing and disposing of its assets." *Martin v. Feilen*, 965 F.2d 660, 664 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993). As the district court recognized, the critical legal issue in this case is the precise nature and extent of FirsTier's duty as trustee in lending Plan assets to the Participants.

A.

FirsTier argues that it had *no* fiduciary duty with respect to these participant loans because it made the loans "at the direction of the Company" under paragraph 20 of the Plan and therefore did not exercise fiduciary discretion. We disagree.

FirsTier is the named trustee under the Plan, authorized and directed to hold, manage, invest, and account for all Plan assets. ERISA provides that

> a person is a fiduciary to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of [plan] assets. . . .

29 U.S.C. § 1002(21)(A). Note that this section imposes fiduciary duties only if one exercises *discretionary* authority or control over plan *management*, but imposes those duties *whenever* one deals with plan *assets*. This distinction is not accidental – it reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 524 (1993) ("Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement plan participants will receive").

It is true, as FirsTier notes, that a trustee's control of ERISA plan assets may be made "subject to proper directions" of another fiduciary if those directions "are made in accordance with the terms of the plan and . . . are not contrary to this chapter." 29 U.S.C. § 1103(a). This provision no doubt modifies, but we conclude it does not eliminate, the trustee's fiduciary duty when handling plan assets. When the direction comes from another fiduciary, as it did in this case, the law of trusts does not excuse a compliant trustee from all fiduciary responsibility:

> [W]here the holder of the power [to direct the trustee] holds it as a fiduciary, the trustee is not justified in complying with his directions if the trustee knows or ought to know that the holder of the power is violating his duty to the beneficiaries as fiduciary in giving the directions.

IIA Scott on Trusts § 185, at p. 574 (4th ed. 1987). We conclude from the limitation in § 1103(a) to directions "not contrary to this chapter" that Congress adopted this standard in ERISA. Thus, an ERISA trustee who deals

with plan assets in accordance with proper directions of another fiduciary is not relieved of its fiduciary duties to conform to the prudent man standard of care, *see* 29 U.S.C. § 1104(a); to attempt to remedy known breaches of duty by other fiduciaries, *see* 29 U.S.C. § 1105(a); and to avoid prohibited transactions, see 29 U.S.C. § 1106.

B.

Though the Participants accuse FirsTier of violating the prudent man standard of care, analysis of whether FirsTier breached this fiduciary duty must begin with a prohibited transaction issue. An ERISA fiduciary may not cause a plan to engage in a transaction "if he knows or should know that such transaction constitutes a direct or indirect . . . extension of credit between the plan and a party in interest." 29 U.S.C. § 1106(a)(1). LPC and the Participants are "parties in interest" to the LPC Plan. *See* 29 U.S.C. § 1002(14)(C), (H). Thus, absent an exemption, the April 1987 plan participant loans were prohibited transactions – direct loans from the Plan to the Participants, and arguably indirect loans from the Plan to LPC.

However, 29 U.S.C. § 1108(b)(1) exempts from the prohibitions of § 1106

> [a]ny loans made by the plan to . . . participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26), in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions

> regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured.

Paragraph 20 of the LPC Plan specifically authorized plan participant loans that met the above-quoted statutory requirements. Paragraph 20 provided that LPC could direct the trustee to make such loans, that the Plan's Administrative Committee would establish the terms and conditions of the loans, and that the trustee would fix the manner of repayment and would set a "reasonable rate of interest."

The district court found that the April 1987 loans were made in compliance with paragraph 20 of the Plan and with § 1108(b)(1). Therefore, FirsTier satisfied its fiduciary duty under § 1103(a) to ensure that LPC's directions and the resulting loans "were made in accordance with the terms of the plan and . . . not contrary to [ERISA]." The court also found that FirsTier had no knowledge that the Participants would lend the loan proceeds to LPC and no knowledge that LPC would use that money to repay FirsTier.

The Participants do not challenge these findings on appeal. Rather, they concede the facial validity of the April 1987 participant loans under § 1108(b)(1) but allege that FirsTier violated ERISA's "prudent man standard of care"[4] by failing to investigate the underlying purpose of

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[4] "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the

these loans. This duty to inquire arose, they contend, because FirsTier had rejected an improper attempt to substitute Dombrowski as trustee and knew LPC was in financial difficulty and deeply in debt to FirsTier. Had FirsTier bank inquired, the argument continues, it would have learned that Dombrowski had coerced the Participants to transfer the loan proceeds to LPC so that it could pay down its debt to FirsTier. This was a prohibited transaction by fiduciary Dombrowski which created a conflict of interest for FirsTier as both Plan trustee and LPC creditor. Therefore, the argument concludes, had FirsTier learned the purpose of the participant loans, it would have refused LPC's direction to make them.

Although the Participants cite no relevant authorities, we have found at least some support in the trust law treatises for the duty to inquire they seek to impose:

> The trustee is not necessarily justified in complying with the directions of the holder of the power merely because he does not actually know that the latter is violating his duty as fiduciary. . . . He is ordinarily under a duty to make a reasonable inquiry and investigation in order to determine whether the holder of the power is violating his duty.

IIA *Scott on Trusts* § 185, at p. 575. But we doubt this is the "ordinary" situation referred to. For here FirsTier made the loans not only at the direction of fiduciary Dombrowski, but also at the request of the Participants themselves. When acting at the direction of the ultimate

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conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B).

beneficiary of a trust, the trustee's fiduciary duty is satisfied if it simply complies with a direction that does not violate the terms of the trust. *Id.* at p. 574. Translating these general trust principles to ERISA, we find nothing in the statute suggesting that, to be prudent, a trustee must ask the recipients of participant loans that are exempt under § 1108(b)(1) the purpose for which they are lawfully borrowing their share of the plan's assets. *Cf. Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986).

The Participants cite no ERISA or common law trust cases for the duty to inquire they seek to impose.[5] Their argument boils down to this: because FirsTier properly refused to allow Dombrowski to gain direct control of the Plan assets for the benefit of LPC, FirsTier had a duty to make sure that Dombrowski did not enlist the aid of the Participants to indirectly achieve his objective. But the Participants' real quarrel is with paragraph 20 of the Plan, which permitted LPC to direct participant loans which its employees could then use for a variety of high-risk purposes that the trustee could not prudently undertake on their behalf. Because FirsTier obeyed the Plan and the statute, the Participants may not shift to FirsTier responsibility for their own subsequent loss of the loan proceeds, or for the unknown misdeeds of another fiduciary, Dombrowski. Thus, on the specific facts of this case, we

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[5] Cases such as *Whitfield v. Cohen*, 682 F. Supp. 188 (S.D.N.Y. 1988), holding that trustees have a duty to investigate proposed investments are distinguishable because they involved discretionary acts by fiduciaries who retained control of the trust assets. Here, FirsTier was directed by another fiduciary to relinquish control of the loan proceeds to their ultimate beneficiaries.

agree with the district court that FirsTier had no duty to inquire.[6]

The district court also expressly found that Dombrowski did not coerce the Participants into lending the participant loan proceeds to LPC. Dombrowski testified that he did not threaten his employees; he simply asked for their help because LPC needed cash to pay down its bank loans so that it could obtain new financing for the upcoming construction season. Although the record might also support a contrary finding, the district court's finding of no coercion is not clearly erroneous. Absent such coercion, there was no breach of fiduciary duty by any fiduciary.[7]

For the foregoing reasons, we agree with the district court that FirsTier breached no ERISA fiduciary duty in making the April 1987 loans to the Participants.

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[6] FirsTier's dual role as both creditor of LPC and trustee of the Plan does not alter this conclusion given the district court's findings. "[W]here a bank has both a trust department and a commercial department, there is inevitably built into the situation the possibility of conflicts of interest. This does not make all transactions by the trust department voidable when there is a conflict of interest, but only those in which the bank has been influenced by a desire to promote its own interests, rather than those of the beneficiaries of the trusts." IIA *Scott on Trusts* § 170.23A.

[7] *See* the Department of Labor's comments in adopting final regulations under § 1108(b), 54 Fed. Reg. 30,519, 30,521 (1989). These regulations are prospective only and do not govern this case. *See* 29 C.F.R. § 2550.408b-1(g). We have looked to the regulations and the Department's comments for general guidance but have not considered either their validity or how they might affect the issues decided in this case.

III. The Award of Fees and Expenses to FirsTier.

The district court awarded FirsTier a $64,912.44 attorney's fee from the Plan for defending against the Participants' claims. ERISA expressly authorizes a plan to permit "reimbursement of expenses properly and actually incurred, in the performance of [a Fiduciary's] duties with the plan." 29 U.S.C. § 1108(c)(2). Paragraph 10(i) of the LPC Plan provides:

> The Trustee shall have a lien upon the trust funds for any costs, attorney fees, and other expenses incurred as a result of any suit or proceeding regarding the trust fund to which the Trustee is a party or is reasonably required to take action, except where it is finally determined that the Trustee has breached its duties.

The district court found that FirsTier satisfied this provision and that the requested fee was "reasonable and necessarily incurred."

Plaintiffs argue that the district court erred in not applying our five-factor test for awarding fees in *Lawrence v. Westerhaus*, 749 F.2d 494 (8th Cir. 1984). *Westerhaus* involved the award of fees against an adverse party under 29 U.S.C. § 1132(g), whereas this case involves an award of fees from the Plan for performing Plan-related duties. There is "no statutory or common-law basis for denying fees to a *prevailing* trustee where the trust documents specifically contemplate such reimbursement." *Leigh v. Engle*, 858 F.2d 361, 369 (7th Cir. 1988) (emphasis in original), *cert. denied*, 489 U.S. 1078 (1989); *see* III *Scott on Trusts* § 188.4, at p. 66-67. The voluntary contractual approach of § 1108(c)(2) should ultimately benefit ERISA

participants and beneficiaries, for such fee-shifting provisions "make it easier for pension plans to engage the services of persons unwilling or unable to bear the costs of legal contests." *Packer Engineering, Inc. v. Kratville*, 965 F.2d 174, 175 (7th Cir. 1992).

Of course, like the law of trusts, § 1108(c)(2) leaves an important role for judicial discretion by permitting reimbursement of "expenses properly and actually incurred." Here, the district court recognized it had that discretion and expressly found that the awarded fees and expenses were "reasonable and necessarily incurred." In addition, we are advised that the Plan accounts of other LPC employees have been distributed, so that only the Participants' accounts will be charged for the litigation expenses they caused the trustee to incur. In these circumstances, the award to FirsTier was not an abuse of discretion.

IV. The ERISA Claim Against Silence.

The Participants argue on appeal (i) that non-fiduciaries such as Silence are liable for aiding and abetting breaches of ERISA fiduciary duties, and (ii) that the district court clearly erred in finding that Silence had no knowledge that Dombrowski orchestrated the improper loan of Plan assets to LPC. The first half of this equation is dubious at best. The Participants primarily seek damage relief. Under *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), damages may not be recovered against ERISA non-fiduciaries.

Even if the Silence could be liable for aiding and abetting a breach of fiduciary duty, the Participants'

claims were properly dismissed. As we have already noted, the court's finding that Dombrowski did not coerce the Participants into making the loans to LPC makes it doubtful, at best, that any fiduciary duty was breached. Moreover, Silence testified that he was not aware of Dombrowski's scheme to have participant loan proceeds loaned to LPC until after the fact. Given the circuitous route the funds travelled in getting from the Plan to LPC, this finding is not clearly erroneous.

For these reasons, the Participants' claims against Silence are both legally and factually deficient.

V. The Rule 11 Sanction.

The district court imposed a Rule 11 sanction against the Participants personally and their attorney, Bachman, because their claims against Silence "were not well grounded in fact." The court did not explain the basis for this conclusion, except insofar as its reasoning can be inferred from the findings of fact it made in dismissing the claims against Silence.

Based upon our review of the trial testimony, it is apparent that, prior to trial, attorney Bachman could have expected the Participants' witnesses to present at least two favorable pieces of evidence against Silence. First, LPC's bookkeeper, Gerald Bofenkamp, would testify that employee Duane Olsen (Participant Olsen's deceased husband) told Bofenkamp before the loans were made that Silence had convinced Olsen to borrow from the Plan and lend the proceeds to LPC. Second, Dombrowski would testify that he told Silence on the day the participant loans were made that the loan proceeds would be

transferred to LPC and used to repay FirsTier. At trial, Silence denied these statements, and the district court found Silence credible. But that is of little relevance to the Rule 11 inquiry.

It is true that Bachman had no evidence that Silence as LPC financial consultant also acted as a Plan fiduciary. But when the Participants asserted their third-party claims, and even when the case went to trial, their theory that a non-fiduciary could be liable in damages under ERISA for aiding and abeting a fiduciary's breach of duty was an open issue in this circuit. *See Consolidated Beef Indus., Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 965 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992). In these circumstances, while we agree that the Participants' case against Silence was exceedingly thin, we conclude that it had enough factual and legal support to render the district court's unexplained Rule 11 sanction an abuse of discretion.

We have carefully considered the other issues raised by the Participants on appeal and conclude they are without merit. The award of $8,627.60 to Silence as a Rule 11 sanction is reversed. In all other respects, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3595NEO Firstier Bank, N.A., Omaha, etc., Plaintiff-Appellee, Land Paving Company, et al, Defendants, James R. Zeller, et al, Defendants-Appellants, Frank Bosanek, et al, Defendants,	Appeal from the United States District Court for the District of Nebraska.
James R. Zeller, et al, Third Party-Plaintiffs-Appellants, vs. George N. Silence, et al, Third-Party-Defendants-Appellees, James E. Bachman, Appellant.	

Appellee FirsTier Bank, N.A., Omaha's motion for an award of attorney's fees and expenses in the amount of $23,434.70 against the Profit Sharing Plan and Employees Trust of Land Paving Company is granted. Appellee's

motion for an award of attorneys fees and expenses against the individual Appellants is denied.

April 14, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
AUG 12 1994
OFFICE OF THE CLERK

(2)

No. 94-107

In The

Supreme Court of the United States

October Term, 1994

BRYAN VERCOE,

Petitioner,

vs.

FIRSTIER BANK, N.A., OMAHA, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, *et al.*,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

STATEMENT OF CASE 1

A. Proceedings Below 1

B. Statement of Facts 2

ARGUMENT 7

I. ERISA DOES NOT IMPOSE STRICT LIABILITY UPON A BANK TRUSTEE WHERE THE BANK, IN ITS COMMERCIAL LENDING CAPACITY, IS ALSO A CREDITOR OF THE EMPLOYER SPONSORING A PLAN 7

II. PETITIONER HAS FAILED TO UNDERSTAND OR ACCEPT THE LIMITED FIDUCIARY DUTIES OF AN ERISA DIRECTED TRUSTEE AND WOULD IMPOSE ADDITIONAL DUTIES ON THE TRUSTEE WHERE NONE ARE CREATED BY ERISA 10

III. PETITIONER FOR THE FIRST TIME RAISES THE SPECTER THAT FIRSTIER MAY BE LIABLE FOR THE BREACH OF A CO-FIDUCIARY. HOWEVER, THE TRIAL COURT FOUND AND THE APPELLATE COURT AFFIRMED THAT THERE WAS NO BREACH OF DUTY BY ANY FIDUCIARY 15

IV. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION IN AWARDING FIRSTIER ATTORNEYS FEES AND EXPENSES WHERE THE PLAN PROVIDES FOR THE PAYMENT OF SUCH FEES AND EXPENSES PURSUANT TO ERISA SECTION 408(c)(2), 29 U.S.C. § 1108(c)(2) 15

TABLE OF CONTENTS – Continued

Page

V. THE RICO CLAIM FAILED TO ALLEGE SUFFICIENT FACTS ESTABLISHING A PATTERN OF RACKETEERING WHERE THE UNREFUTED FACTS ESTABLISHED THAT THE TRUSTEE DID NOT KNOW THE PURPOSES OF PARTICIPANT LOANS WHICH OCCURRED THREE YEARS BEFORE THE FOUR ISOLATED LOANS WHICH OCCURRED OVER A ONE OR TWO DAY PERIOD 19

VI. FIRSTIER IS NOT LIABLE UNDER RICO BECAUSE FIRSTIER DID NOT BREACH ITS FIDUCIARY DUTIES WHEN IT MADE THE PARTICIPANT LOANS. FURTHER, PETITIONER'S RICO CLAIM FAILED TO ALLEGE SUFFICIENT FACTS TO ESTABLISH A PATTERN OF RACKETEERING IN CONNECTION WITH FOUR ISOLATED LOANS ALLEGED TO HAVE OCCURRED OVER A ONE OR TWO DAY PERIOD..... 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820 (7th Cir. 1984) 17

Brock v. Citizens Bank, 841 F.2d 344 (10th Cir. 1988) 9

Brown v. Blue Cross and Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990) 7

Ershick v. United Missouri Bank, 948 F.2d 660 (10th Cir. 1991) 8, 9

Griffin v. City of Omaha, 785 F.2d 620 (8th Cir. 1986) 19

H.J., Inc. v. Northwestern Bell, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) 1, 20, 21, 22

Lange v. Hocker, 940 F.2d 359 (8th Cir. 1991) 21

Leigh v. Engle, 858 F.2d 361 (7th Cir. 1988), *cert. denied*, 498 U.S. 1078 (1989) 15

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) 16

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985) 10

Mertens v. Hewett Assoc., ___ U.S. ___, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) 10

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) 19

Sun Ref. and Mktg. Co. v. Goldstein Oil Co., 801 F.2d 343 (8th Cir. 1986) 19

Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976 (8th Cir. 1991) 22

TABLE OF AUTHORITIES – Continued

Page

United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980) 19

United States v. Felice, 481 F.Supp. 79 (N.D. Ohio 1978) 19

STATUTES

18 U.S.C. § 664 ..... 19, 20, 22

18 U.S.C. § 664(a) 19

18 U.S.C. § 1961 Racketeer Influence and Corrupt Organizations Act 1

18 U.S.C. § 1961(1)(A) 19

18 U.S.C. § 1962 21

28 U.S.C. § 2201 1

29 U.S.C. § 1103(a)(1)
Section 403(a) of ERISA 11

29 U.S.C. § 1104(a)(1)
Section 404(a)(1) of ERISA 1

29 U.S.C. § 1105(a)(2)
Section 405(a)(2) of ERISA 15

29 U.S.C. § 1106(b)(1)
Section 406(b)(1) of ERISA 1, 9

29 U.S.C. § 1108(b)
Section 408(b) of ERISA 9

29 U.S.C. § 1108(c)(2)
Section 408(c) of ERISA 7, 15, 16

29 U.S.C. § 1110(a)
Section 410 of ERISA 17

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 1132(a)(3)(B)
Section 502(a)(3)(B) of ERISA 1

29 U.S.C. § 1132(e)(1)
Section 502(a)(1) of ERISA 1

29 U.S.C. § 1132(h)
Section 502(h) of ERISA 18

OTHER AUTHORITIES

H.R. Rep. No. 93-533, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639 (1973)..... 10

Joint Explanatory Statement of the Committee of Conference, H. Conference Rep. No. 93-1280, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038 12

IIA *Scott on Trusts*, § 185 (4th ed. 1987)..... 10

U.S. Dept. of Labor Reg. § 2550.408b-1(a)(4) E(3) 9

STATEMENT OF THE CASE

A. Proceedings Below.

At all times relevant hereto, FirsTier Bank, N.A. Omaha ("FirsTier"), has been the Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company ("Plan"). FirsTier brought a declaratory judgment action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), Section 502(a)(1), 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 2201 to determine its status under the Plan.

Bryan Vercoe ("Petitioner") along with three other Plan participants (collectively "Counter-Plaintiffs") filed a Counterclaim and an Amended Counterclaim against FirsTier pursuant to ERISA Section 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) alleging that FirsTier had breached its fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1) and had engaged in alleged acts of self-dealing prohibited under ERISA Section 406(b)(1), 29 U.S.C. § 1106(b)(1). The Counter-Plaintiffs also alleged causes of action against FirsTier under the Racketeer Influence and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, and numerous common law claims arising under state law.

The trial court dismissed the RICO cause of action in a Memorandum Opinion and Order dated June 15, 1990 (Appendix p. 9). (Hereinafter all references to Petitioner's Appendix shall be designated as "App.") After reviewing the Supreme Court's decision in *H.J., Inc. v. Northwestern Bell*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195, 208-210 (1989), the trial court ruled that the United States Supreme Court provides two methods by which the

threat of criminal continuity can be established and that it was "clear to the Court that the allegations in this case do not meet the test for establishing a pattern of racketeering activity." (App. 11).

The trial court also dismissed the state law causes of action.

Trial on the ERISA claims was held before the Honorable William G. Cambridge. On December 6, 1991, the court entered a verdict for FirsTier and issued Findings of Fact and Conclusions of Law. (App. 13-29). On February 16, 1994, the U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's decision in all respects as to FirsTier. (App. 38-53).

B. Statement of Facts.

To the extent consistent with the trial court's June 15, 1990, Memorandum Opinion and Order and December 6, 1991, Findings of Fact and Conclusions of Law, Respondent generally agrees with the chronology of events recited in Petitioner's brief with the following qualifications.

First, Petitioner presents numerous facts to this Court which are not contained in the Appendix attached to Petitioner's Petition for Writ of Certiorari (*e.g.*, Petitioner states: "The foregoing [loans] represented the maximum amount each of the four employees could borrow. . . . FirsTier never . . . determined that the employees were not being coerced, [and never] informed the employees that the transaction was a breach of trust, or informed the employees that Land Paving was in danger of defaulting

on their loan to FirsTier." (Petition for Writ of Certiorari page 4) (Hereinafter all references to Petitioner's Petition for Writ of Certiorari shall be designated ("Pet."))

Second, Petitioner also recites facts which are clearly contrary to the trial court's Findings of Facts. For example, on page 20 of his brief, Petitioner states: "Additionally, all of the [1984] loans were still outstanding [in 1987]." (Pet. 20). In fact, by 1987, one of the 1984 loans had been fully repaid. (App. 15).

Third, Petitioner fails to recite facts which may have a bearing on questions that would be properly before the Court (*e.g.*, on the RICO issue: "The record reflects the following in regard to this loan: Mr. Lonergan knew that the money was supposedly borrowed from the Plan to loan Land Paving or Dombrowski to pay off Dombrowski's bid rigging fine; Mr. Lonergan neither talked to anyone at FirsTier regarding the February 22, 1984 loan nor disclosed the purposes of the borrowing; FirsTier had no knowledge of the loan's purposes. . . . [t]he Counter-Plaintiffs . . . have not produced any evidence tending to show that Firstier [sic] had knowledge of the purpose of the $42,500 loan made to Lonergan in 1984, or that making the loan was improper." (App. 8). And on the relative weight given to testimony by various witnesses which resulted in the trial court's Findings of Fact and the issue of the appellate court's review of the trial court's Findings of Fact for abuse of discretion: "Bryan Vercoe signed the signature of Zeller's wife to a spousal consent form so that Zeller could obtain his loan." (App. 19)

For the purpose of focusing the Court's attention on the issues discussed in this brief, Respondent summarizes

and recites the trial court's Findings of Fact and Conclusion of Law which were affirmed by the Eighth Circuit Court of Appeals. (App. 13-29).

> "22. On April 1, 1987, Stanley Traub [the trust officer in charge of the Plan's trust account] received two letters signed by Anthony Dombrowski [the president of the company sponsoring the Plan ("LPC")] directing FirsTier to make loans from the Plan to . . . Plan participants. . . .
>
> 23. Section 20 of the Plan refers to loans to Plan participants as directed by the Company stating: ' . . . the trustee may, and shall at the direction of the company, make a loan or loans to a participant.' "

(App. 19).

> "28. FirsTier's trust department did not know the purpose or the use of the Plan loan proceeds, and FirsTier's loan department did not know the source of the credit loan payments from LPC to FirsTier.
>
> 29. . . . FirsTier was not aware of . . . [an] alleged threat by Mr. Dombrowski to the employees [of LPC].
>
> 30. The employees were not in fact threatened or coerced by either Mr. Dombrowski or by anyone else into borrowing the money from the plan or into loaning it to Anthony Dombrowski and LPC but they both so borrowed the money and so loaned it voluntarily and freely."

(App. 20).

> "34. The directions and the information available to FirsTier did not clearly or otherwise

indicate that FirsTier's issuance of the loans would be prohibited by the Plan or ERISA. . . .

35. As a directed Trustee, FirsTier did not have any obligation or responsibility under the Plan or under ERISA under the facts of this particular case to investigate or to inquire into the purposes of the loans to determine what the participants would do with the funds, and it did not have any duty to monitor the use of the loan proceeds.

. . .

39. FirsTier did not violate Section 404 or Section 406 of ERISA by making the subject April 1, 1987, or April 2, 1987, directed participant loans."

(App. 21).

"43. FirsTier did not know and should not have known under the facts and circumstances of this case that the Plan loans constituted indirect lending of money or other extension of credit between the Plan and the party in interest.

44. FirsTier did not know and should not have known under the facts and circumstances in this case that the Plan loans constituted indirect transfers to or use by or for the benefit of a party in interest of any assets of the Plan.

45. A Plan trustee is not required to make a thorough investigation when a Plan participant borrows under a Plan such as this when the employer as a fiduciary has the right to and does under the Plan direct it when the Plan as it does in this case says that the trustee shall make the loan and when the papers that are submitted

> do not clearly show any violation of either the Plan or the law (ERISA). . . . "

(App. 24).

The Eighth Circuit affirmed the trial court's Findings of Fact, stating:

> "Because FirsTier obeyed the Plan and the statute, the Participants may not shift to FirsTier responsibility for their own subsequent loss of the loan proceeds, or for the unknown misdeeds of another fiduciary, Dombrowski. Thus, on the specific facts of this case, we agree with the district court that FirsTier had no duty to inquire."

(App. 48-49).

While the Eighth Circuit Court of Appeals stated that the record might support a contrary finding, the court affirmed the trial court's express finding that Dombrowski did not coerce the participants into lending the participant loan proceeds to LPC. (App. 49). "Absent such coercion, there was no breach of fiduciary duty by *any* fiduciary." (App. 49) (emphasis added).

In addition to the foregoing facts, as found by the trial court and affirmed by the appellate court, the trial court found that Plan expressly provides recovery for attorneys fees and expenses incurred by FirsTier in connection with this litigation. Paragraph 10.i. of the Plan provides:

> "The Trustee shall have a lien upon the trust funds for any costs, attorneys fees, and other expenses incurred as a result of any suit or proceedings regarding the trust fund to which

> the Trustee is a party or is reasonably required to take the action, except when it is finally determined that the Trustee has breached its duties. . . . "

(App. 31). Pursuant to this provision, which is authorized by ERISA Section 408(c), 29 U.S.C. § 1108(c)(2), the trial court found that FirsTier was entitled to recover from the trust fund attorneys fees and expenses in the total amount of $64,912.44. (App. 33). Pursuant to the same provision, the Eighth Circuit Court of Appeals affirmed the trial court's award and found that FirsTier was entitled to recover an award of attorneys fees and expenses in an additional total amount of $23,434.70. (App. 54).

ARGUMENT

I. ERISA DOES NOT IMPOSE STRICT LIABILITY UPON A BANK TRUSTEE WHERE THE BANK, IN ITS COMMERCIAL LENDING CAPACITY, IS ALSO A CREDITOR OF THE EMPLOYER SPONSORING A PLAN.

Quoting dicta from *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), Petitioner would have this Court believe that the Eleventh Circuit held that an ERISA trustee who acts where a potential conflict of interest exists, without regard to the trustee's knowledge that it might benefit from the transaction, is per se strictly liable and the beneficiary may either void the transaction or force the trustee to disgorge all profits directly or indirectly realized as the result of the transaction. (Pet. 7-8). In fact, Petitioner's quotation from *Brown v. Blue Cross, supra*, is not the holding of the case. Rather,

the quoted passage is only a portion of the court's discussion of the amount of deference to be given to a discretionary trustee's decision where the existence of a conflict of interest is obvious to the trustee.

The Tenth Circuit has specifically held that it is not a per se conflict of interest for a bank to simultaneously serve both as plan trustee and as commercial lender to the plan sponsor. *Ershick v. United Missouri Bank*, 948 F.2d 660, 671 (10th Cir. 1991). *Ershick* provides a particularly apt analogy to the case at hand since it also involved the actions of a plan trustee taken at the direction of another named fiduciary. In *Ershick*, the plan's trustee bank was held not liable to plan participants with respect to investment activities that were allowed by the plan and which were undertaken only at the specific direction of the plan administrator. According to the terms of the plan, the trustee bank was required to follow the directions of the plan administrator. The court found no evidence suggesting that the bank utilized its position as trustee to further its own interests to the detriment of plan participants in violation of ERISA. *Id.* at 668.

In the present case, Petitioner failed to establish that FirsTier acted with any intent to enrich itself or had in any manner arranged to have the participant loan proceeds be paid to itself in its commercial lending capacity. The trial court specifically found that:

> "FirsTier's trust department did not know the purpose or use of the Plan loan proceeds, and FirsTier's loan department did not know the source of the credit loan payments from LPC to FirsTier. . . . FirsTier was not aware of . . . [an]

> alleged threat by Mr. Dombrowski to the employees."

(App. 20).

The knowledge of the plan trustee that it is engaging in a prohibited transaction in connection with an indirect loan to a party in interest is a prerequisite to finding that the trustee engaged in a prohibited transaction defined in ERISA Section 406, 29 U.S.C. § 1106. *Ershick, supra. Brock v. Citizens Bank*, 841 F.2d 344, 347 (10th Cir. 1988); and D.L.R. § 2550.408b-1(a)(4) E(3) (The example in the U.S. Department of Labor's participant loan regulations describes a participant loan program where an employer pressures its employees to borrow funds pursuant to the program and then reloan the proceeds to the employer. Another plan fiduciary, which is unaware of the employer's activities, makes the loans. Since the loans meet all of the conditions of ERISA Section 408(b)(1), 29 U.S.C. § 1108(b), *such loans are exempt from the prohibited transaction rules*. However, the employer's activity is a *separate* transaction which is not exempt under ERISA Section 408(b)(1). Note that the example does not place on the fiduciary making the loans a duty to determine the participants' purpose or the use of the loan proceeds or to determine whether the participants were pressured by their employer into requesting the loans.)

Stated simply, during the course of a four-day trial, Petitioner was unable to adduce any evidence that Firs-Tier in either its trustee or lending capacity knew or suspected that it would receive any direct or indirect benefit from the lawful participant loans that the trustee

was directed to make by another fiduciary in accordance with the terms of the Plan and ERISA.

II. PETITIONER HAS FAILED TO UNDERSTAND OR ACCEPT THE LIMITED FIDUCIARY DUTIES OF AN ERISA DIRECTED TRUSTEE AND WOULD IMPOSE ADDITIONAL DUTIES ON THE TRUSTEE WHERE NONE ARE CREATED BY ERISA.

Petitioner does not dispute that LPC directed FirsTier to make the loans in accordance with the terms of the Plan. According to Section 20 of the Plan, FirsTier was a directed trustee with respect to making participant loans at the direction of another named fiduciary.

While ERISA codified much of the common law of trusts, it also modified the common law in several important respects. *See, e.g. Mertens v. Hewett Assoc.*, ___ U.S. ___, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993) (ERISA actions for "appropriate equitable relief" do not include some types of compensatory relief that are available at common law; 113 S. Ct. at 2064); and, *Massachusetts Mut. Life Ins. Co. v. Russell* , 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985) ("The principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans." 473 U.S. at, 152-53 n. 6, 105 S. Ct. at 3096 (*quoting* H.R. Rep. No. 93-533, p. 11, 13 (1973), *reprinted in* U.S.C.C.A.N. 4639, 4651.))

Petitioner quotes correctly the common law regarding the duties of a directed trustee. (Pet. 23) (*quoting* IIA *Scott on Trusts*, § 185 at 574 (4th ed. 1987)). However,

ERISA specifically provides that a qualified plan may provide that a trustee is:

> "[S]ubject to the direction of a named fiduciary who is not a trustee, in which case the trustee shall be subject to the proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act."

ERISA Section 403(a), 29 U.S.C. § 1103(a)(1).

In the legislative history of ERISA, Congress set forth the standard of care that a directed trustee must follow in determining whether a direction is proper and in accordance with the terms of the plan and ERISA:

> "If the plan provides that the trustees are subject to the direction of named fiduciaries, then the trustees are not to have exclusive management and control over the plan assets, but generally are to follow the directions of the named fiduciary. Therefore, if the plan sponsor wants an investment committee to direct plan investments, he may provide for such an arrangement in the plan. In addition, since investment decisions are basic to plan operations, members of such investment committee are to be named fiduciaries. (For example, the plan could provide that the investment committee is to consist of persons who serve as the president, vice-president for finance and comptroller of the employer.) **If the plan so provides, the trustee who is directed by an investment committee is to follow the committee's directions *unless it is clear on their face* that the actions to be taken under those directions would be prohibited by the fiduciary responsibility rules of the bill or**

> **would be contrary to the terms of the plan or trust."**

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5079 (emphasis added, parentheses in original). The highlighted portion of the Conference Report shows clearly that Congress intended to depart from the common law's standard of care and duties as applied to a directed trustee of an ERISA plan.

That Congress intended to exonerate an ERISA directed trustee from liability, if it follows the foregoing standard of care and duties, is also demonstrated in the legislative history by the following:

> "As described above (*Establishment of trust*) the plan may also provide that the trustee is to be subject to the direction of named fiduciaries with respect to investment decisions. **In this case, if the trustee properly follows the instructions of the named fiduciaries, the trustee generally is not to be liable for losses which arise out of following these instructions.** (The named fiduciaries, however, would be subject to the usual fiduciary responsibility rules and would be subject to liability on breach of these rules.)"

Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5082-83 (emphasis added, italics and parentheses in original).

However, Petitioner in the present case would impose additional duties upon directed ERISA plan trustees to determine the purpose of participant loans; to determine whether employees have been coerced in connection with requesting such loans, to inform participants that the transaction may constitute a breach of trust and to advise participants of their employer's financial condition and the wisdom of the investment. (Pet. 4). A directed trustee would also be required to inform participants requesting loans of their rights and provide all information and facts that the trustee knew or should have known and determine whether the transaction is fair and reasonable. (Pet. 13). Then, after having provided all of this information to the participants, the directed trustee would also be required to obtain consents from the participants, if it appears that the transaction might in any way result in an indirect extension of credit to a party in interest. (Pet. 14).

Neither ERISA, its legislative history, nor the regulations promulgated by the U.S. Department of Labor concerning participant loans support the imposition of these duties on a trustee in connection with participant loans generally and do not support the imposition of such duties on a directed trustee in particular. The trial court and the Eighth Circuit Court of Appeals correctly stated and applied the proper ERISA standard of care, and duties with respect to a trustee in connection with processing a participant loan to be made at the direction of another named fiduciary. The trial court stated:

> "ERISA requires a trustee to follow the directions of a named fiduciary if the plan so provides and if the directions do not clearly

> disclose on their face or the trustee does not know or the trustee should not have known that the directions are contrary to the Plan or ERISA."

(App. 20-21).

The Eighth Circuit Court of Appeals stated:

> "[W]e find nothing in the statute suggesting that, to be prudent, a trustee must ask the recipients of participant loans that are exempt under § 1108(b)(1) the purpose for which they are lawfully borrowing their share of the plan's assets. . . . But the Participants' real quarrel is with paragraph 20 of the Plan, which permitted LPC to direct participant loans which its employees could then use for a variety of high-risk purposes that the trustee could not prudently undertake on their behalf. Because FirsTier obeyed the Plan and the statute, the Participants may not shift to FirsTier responsibility for their own subsequent loss of the loan proceeds, or for the unknown misdeeds of another fiduciary, Dombrowski. Thus, on the specific facts of this case, we agree with the district court that FirsTier had no duty to inquire."

(App. 48-49).

III. PETITIONER FOR THE FIRST TIME RAISES THE SPECTER THAT FIRSTIER MAY BE LIABLE FOR THE BREACH OF A CO-FIDUCIARY. HOWEVER, THE TRIAL COURT FOUND AND THE APPELLATE COURT AFFIRMED THAT THERE WAS NO BREACH OF DUTY BY ANY FIDUCIARY.

In his brief, Petitioner for the first time raises the specter that FirsTier could be liable on account of a breach of duty committed by another fiduciary pursuant to ERISA Section 405(a)(2), 29 U.S.C. § 1105(a)(2). (Pet. 25). However, the trial court found no breach of fiduciary duty by any other fiduciary. (App. 20). The Eighth Circuit Court of Appeals affirmed this finding and concluded that "there was no breach of fiduciary duty by any fiduciary." (App. 49).

IV. THE COURTS BELOW DID NOT ABUSE THEIR DISCRETION IN AWARDING FIRSTIER ATTORNEYS FEES AND EXPENSES WHERE THE PLAN PROVIDES FOR THE PAYMENT OF SUCH FEES AND EXPENSES PURSUANT TO ERISA SECTION 408(c)(2), 29 U.S.C. § 1108(c)(2).

In his brief, Petitioner misleads this Court with the following statement:

> "In the Eighth Circuit's holding, the court cites as authority the case of *Leigh v. Engle*, 858 F.2d 361 (7th Cir. 1988) to support its per se award of fees. But immediately after the language quoted from *Leigh*, the Seventh Circuit applied the five factor formula. *Id.* at 369. Therefore, *Leigh* clearly does not stand for the proposition as cited, but for the need to apply an underlying standard in making an award."

(Pet. 18-19). In fact, the recitation of the five factor test for the award of attorneys' fees in the above-cited case (hereinafter *"Leigh II"*) is a restatement of a standard enunciated by the Seventh Circuit in connection with an earlier appeal of the same case that the court designated as *Leigh I. Leigh II*, 858 F.2d at 369, referring to *Leigh v. Engle*, 727 F.2d 113, 139 n. 39 (1984). Contrary to Petitioner's contention, in *Leigh II* , the Seventh Circuit *did not affirm but rather disavowed* the use of the five factor test in cases involving prevailing defendant trustees. It was the new standard enunciated in *Leigh II* that was cited by the Eighth Circuit Court of Appeals in affirming the trial court's award of attorneys' fees to FirsTier. (App. 50).

Section 10.i. of the Plan expressly provides for recovery of fees and expenses by FirsTier in a case such as this:

> "The Trustee shall have a lien upon the trust funds for any costs, attorneys fees, and other expenses incurred as a result of any suit or proceeding regarding the trust fund to which the Trustee is a party or is reasonably required to take action, except where it is finally determined that the Trustee has breached its duties. . . . "

(App. 31). Such a provision is specifically authorized by ERISA Section 408(c), 29 U.S.C. § 1108(c)(2) which provides for a fiduciary's reimbursement of expenses properly and actually incurred in the performance of its duties with the Plan. Where a trustee believes that it is necessary to seek the court's guidance as to its status with respect to the Plan and then is called upon to defend its actions with respect to the performance of its duties pursuant to the terms of the Plan, these proceedings give rise to

"expenses [which are] properly and actually incurred, in the performance of [its] duties with the plan." *Id.*

While the charges brought against FirsTier have proven groundless, FirsTier has incurred substantial expenses and legal fees to defend itself in the trial court, before the Eighth Circuit Court of Appeals and in connection with this Petition. The costs, expenses and fees incurred in prosecuting this case and defending Petitioner's counterclaims are far in excess of any fees it received as Trustee under the Plan. The five factor test urged by Petitioner cannot be made applicable to the case at hand. The five factor test "is oriented toward the case where the plaintiff rather than the defendant prevails and seeks an award of attorney's fees." *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 829 (7th Cir. 1984). The Seventh Circuit's pronouncement in *Leigh II* is particularly appropriate for this case:

> "The trust instruments allow for reimbursement of fees, and allow a reserve to be set up to ensure payment. The only real question is whether the trust provisions conflict with ERISA. They do not. While an award of fees to a losing defendant certainly would contravene Congress' intent, *see* 29 U.S.C. § 1110(a), plaintiffs point us to no statutory or common-law basis for denying fees to a *prevailing* trustee where the trust documents specifically contemplate such reimbursement.
>
> Plaintiffs argue that this result unjustly deprives the beneficiaries of their funds. We sympathize, to the extent that plaintiffs think that it is disgraceful for pensioners to be

> deprived of their benefits because of this seemingly endless litigation. . . . Defendants *prevailed* as to most of the claims. . . . Defendants expended great sums of money defending meritless claims. Very few people would become plan administrators if subjected to such unjust, extensive potential costs. Reimbursement here conformed with the trust documents and ERISA. We therefore affirm that aspect of the district court's holding."

Leigh II, 838 F.2d at 369 (emphasis in original).

Petitioner makes much out of the facts that FirsTier argued that it was not a fiduciary with respect to the Plan and that it raised jurisdictional objections to the participants' counterclaims. The issue of whether FirsTier is a fiduciary with respect to the Plan is directly connected to its original application to the court to determine its status with respect to the Plan.

It is a truism that the issue of a court's jurisdiction to hear a matter may be raised and argued at any time. If the Counter-Plaintiffs had followed the proper procedures of serving copies of their complaint upon the Secretaries of Labor and Treasury as required by ERISA Section 502(h), 29 U.S.C. § 1132(h), FirsTier would have had no reason to raise and press the issue of the courts' jurisdiction. Petitioner should not now complain of attorneys fees and expenses incurred as a result of his own failure to follow the simple and clear service requirements set forth in ERISA.

In summary, it is clear that the trial court did not abuse its discretion in awarding FirsTier's reasonable

attorneys' fees and expenses in connection with this action as authorized by the Plan and ERISA.

V. THE RICO CLAIM FAILED TO ALLEGE SUFFICIENT FACTS ESTABLISHING A PATTERN OF RACKETEERING WHERE THE UNREFUTED FACTS ESTABLISHED THAT THE TRUSTEE DID NOT KNOW THE PURPOSES OF PARTICIPANT LOANS WHICH OCCURRED THREE YEARS BEFORE THE FOUR ISOLATED LOANS WHICH OCCURRED OVER A ONE OR TWO DAY PERIOD.

RICO requires proof of predicate acts, and there can be no RICO liability here because the trial court ultimately found from the evidence that FirsTier did not breach its fiduciary duties as trustee of the Plan. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 3285, 87 L. Ed. 2d 346, 358-59 (1985). The trial court's Findings of Fact will not be disturbed on appeal unless clearly erroneous. *Sun Ref. and Mktg. Co. v. Goldstein Oil Co.*, 801 F.2d 343, 346 (8th Cir. 1986); *Griffin v. City of Omaha*, 785 F.2d 620, 625 (8th Cir. 1986).

The term "racketeering activity" under RICO refers to "predicate acts" which are defined as any certain "chargeable" or "indictable" acts enumerated in 18 U.S.C. § 1961(1)(A). Petitioner contends that FirsTier willfully embezzled funds from the Plan in violation of 18 U.S.C. § 664. To prevail, Petitioner had to prove that FirsTier **willfully breached** its fiduciary duties to participants. *See* 18 U.S.C. § 664(a) (1991); *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980); *United States v. Felice*, 481 F.Supp. 79 (N.D. Ohio 1979).

In dismissing the Counter-Plaintiffs' RICO claim, the trial court stated that:

> "Mr. Lonergan neither talked to anyone at FirsTier regarding the February 22, 1984 loan nor disclosed the purposes of the borrowing; FirsTier had no knowledge of the loan's purposes. . . . The counter-plaintiffs . . . have not produced any evidence tending to show that Firstier [sic] had knowledge of the purpose of the $42,500 loan made . . . in 1984, or that the making of the loan was improper. Thus, the Court finds as a matter of law that FirsTier has not breached any fiduciary duty in regard to the $42,500 loan."

(App. 8).

After a four day trial, the Counter-Plaintiffs were still unable to produce any evidence that FirsTier committed any acts in violation of 18 U.S.C. § 664. (App. 20). The trial court specifically found that FirsTier did not violate its fiduciary duties in making the participant loans. (App. 22-24).

VI. FIRSTIER IS NOT LIABLE UNDER RICO BECAUSE FIRSTIER DID NOT BREACH ITS FIDUCIARY DUTIES WHEN IT MADE THE PARTICIPANT LOANS. FURTHER, PETITIONER'S RICO CLAIM FAILED TO ALLEGE SUFFICIENT FACTS TO ESTABLISH A PATTERN OF RACKETEERING IN CONNECTION WITH FOUR ISOLATED LOANS ALLEGED TO HAVE OCCURRED OVER A ONE OR TWO DAY PERIOD.

This Court in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989) established that the continuity of criminal conduct required to

establish a "pattern" of racketeering activity under 18 U.S.C. § 1962 may be established in two ways. A party alleging a RICO violation may demonstrate continuity during a closed-end time by showing numerous predicate acts extending over a substantial period of time. In the alternative, a party must allege predicate acts that, by their nature, demonstrate a "threat of continuity." *Lange v. Hocker*, 940 F.2d 359, 361 (8th Cir. 1991).

The Counter-Plaintiffs failed to allege or prove sufficient facts to demonstrate continuity under either approach. RICO claims in which the allegations of close-ended continuity occurring during a very short duration of the alleged scheme fail to show "related predicate acts extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 242, 109 S. Ct. at ___, 106 L. Ed. 2d at 209. In *Lange v. Hocker, supra*, the court stated:

> "Read in the light most favorable to the plaintiffs, the complaint alleges that a number of predicate acts (namely, wire and mail fraud and the illegal corporate transaction) were committed between August 25, 1988 and September 21, 1988. Acts committed in such a short time span do not constitute a pattern of racketeering activity. 'Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement. . . . ' "

Id. at 361 (footnote omitted).

The gravamen of the Counter-Plaintiffs complaint centered around four participant loans FirsTier made over a total period of ONLY one or two days. (App. 21).

Since the trial court found that FirsTier had no knowledge of the purposes of loans that were made three years earlier, it could not have willfully participated in a conspiracy to embezzle pension funds or willfully breached a fiduciary duty within the meaning of 18 U.S.C. § 664 with respect to such loans. (App. 8). Not only were the number of alleged predicate acts few, but the notion that close-ended continuity could be created in such a short period of time does not comport with the stated goals of RICO. Furthermore, there was absolutely no threat of ongoing future "criminal conduct," since the Company had ceased operations within three months of the loans.

The participants did not allege any facts in their counterclaim even suggesting "threat of continuity." In *Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank*, 934 F.2d 976 (8th Cir. 1991), the Eighth Circuit Court articulated three situations in which the threat of continued criminal activity could be shown:

> "(1) the predicate acts themselves involve an actual threat of long-term racketeering activity, either implicit or explicit, (2) 'the predicate acts or offenses are part of an ongoing entity's regular way of doing business, or (3) the predicate acts 'are a regular way of conducting [an] ongoing legitimate business' (in the sense that it is not a business that exists for criminal purposes). . . . ' "

Id. at 980 (*quoting H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, at 242-43, 109 S. Ct. at ___, 106 L. Ed. 2d at 209-10 (footnote omitted)).

A threat of continuing criminal activity cannot be established by alleging a single transaction to a single

victim over a short period of time. As this Court noted in *H.J. Inc., supra,* several related acts over a very short period of time do not satisfy the continuity requirement for a pattern of racketeering.

After a four day trial on the merits of the participants' ERISA claims, the trial court concluded that FirsTier did not breach any fiduciary duties as trustee of the Plan, FirsTier's loan department did not know the source of the credit loan payments from the company and neither the company's president nor anyone else threatened or coerced the participants into borrowing money from the Plan or into loaning the money to the president or the company. (App. 20). These findings were specifically affirmed by the Eighth Circuit Court of Appeals. (App. 49).

In summary, even if there were a reversal of the trial court's ruling dismissing the participants' RICO claim, there can be no liability because the trial court properly concluded that FirsTier did not breach its fiduciary duties.

CONCLUSION

FirsTier requests that the Petition for Writ of Certiorari be denied and FirsTier be awarded its attorneys fees and expenses in connection with the preparation of this Brief in Opposition. Such action is in accord with the express provisions of ERISA, with the terms of the Plan and with the evidence which was fully litigated and adduced in the trial court and affirmed by the Eighth Circuit Court of Appeals.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(3)

No. 94-107

In The

Supreme Court of the United States

October Term, 1994

BRYAN VERCOE,

Petitioner,

vs.

FIRSTIER BANK, N.A., OMAHA, As Trustee of the Profit Sharing Plan and Employees Trust of Land Paving Company, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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24 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE PETITIONER REQUESTS THAT THIS COURT CONTACT THE UNITED STATES DEPARTMENT OF LABOR FOR THE PURPOSE OF REQUESTING THEIR VIEWS REGARDING THE ISSUES HEREIN 1

II. FIRSTIER DID NOT DISPUTE ANY OF THE EVIDENCE ESTABLISHING A CONFLICT OF INTEREST 2

III. A UNIFORM RATIONAL METHOD OF AWARDING ATTORNEY FEES MUST BE ESTABLISHED 6

IV. FIRSTIER CANNOT BE A DIRECTED TRUSTEE AS A MATTER OF LAW 8

APPENDIX ..... App. 66

TABLE OF AUTHORITIES

Page

CASES

In Re Beck Ind., Inc., 605 F.2d 624 (2nd Cir. 1979) 10

Brown v. Blue Cross and Blue Shield of Alabama, 898 F.2d 1556 (11th Cir. 1990).....4, 5

Ershick v. United Missouri Bank, 948 F.2d 660 (10th Cir. 1991) 5

Franklin v. Thornton, 983 F.2d 939 (9th Cir. 1993) 7

Fulton Nat'l Bank v. Tate, 363 F.2d 562 (5th Cir. 1966)..... 5

Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984) 6

Leigh v. Engle, 858 F.2d 361 (7th Cir. 1988) 6

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928)..... 4

Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 1558 95 L.Ed.2d 39 (1987)..... 7

Quesenberry v. Life Ins. Co. of North America, 987 F.2d 1017 (4th Cir. 1993)..... 7

STATUTES

29 U.S.C. 158(a)(1) of the Labor Management Relations Act, Section 8(a)(1)..... 9

29 U.S.C. Section 1103(a)
Section 403(a) of ERISA..... 8

29 U.S.C. Section 1105(c)(1)
Section 405(c)(1) of ERISA 5, 8

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. Section 1105(c)(3)
Section 405(c)(3) of ERISA 5, 8

U. S. Supreme Court Rule No. 15.1 2

OTHER AUTHORITIES

Department of Labor Regulations
Section 2550.408b-1(a)(4)E(3) 1

IIA *Scott on Trusts*, Section 170 p. 311..... 3, 4, 6

G. Bogert & G. Bogert, *Law of Trusts and Trustees*,
Section 543, p. 217 (Revised 2d edition 1982) 6

G. Bogert & G. Bogert, *Law of Trusts and Trustees*,
Section 941, p. 457 (2nd Rev. Ed. 1982) 9

Restatement (Second) of Trusts,
Section 216(2) (1959)..... 9

Restatement (Second) of Trusts, Section 216 Comment k (1959) 9

I.

THE PETITIONER REQUESTS THAT THIS COURT CONTACT THE UNITED STATES DEPARTMENT OF LABOR FOR THE PURPOSE OF REQUESTING THEIR VIEWS REGARDING THE ISSUES HEREIN.

As noted in a letter dated May 4, 1994, from Alexander Fernandez of the Plan Benefits Security Division, the Department of Labor is willing to review this matter if this Court requests their views. (App. 68) The issues herein involve issues of first impression for this Court regarding the doctrine of strict liability and attorney fee awards. They also involve the interpretation of Department of Labor regulations.

In this regard, FirsTier cites the Department of Labor regulations Section 2550.408b-1(a)(4)E(3) for the proposition that the trustee has no duty to investigate the purpose of a loan. (Respondents' Brief in Opposition, p.9) This example is easily distinguishable because it does not state whether the trustee should have known or had a conflict of interest. The preamble clearly states that a trustee must take actions "exclusively for the benefit of the participants" and requires "the absence of any inappropriate precondition or other facts and circumstances indicating that the loan program is not administered primarily for the benefit of the participants." (App. 64-65) Due to the significance of the issues and the possible misinterpretation of the Department of Labor's position, the Petitioner requests that this Court contact the Department of Labor for their views on the issues herein.

II.

FIRSTIER DID NOT DISPUTE ANY OF THE EVIDENCE ESTABLISHING A CONFLICT OF INTEREST.

The rules of this Court are clear that a petitioner is not limited to the findings of fact because the respondent is "admonished that they have an obligation to point out any perceived misstatements *in their brief of opposition.*" Sup. Crt. Rule 15.1 (emphasis in original).

The fact that the amounts borrowed from the Plan represented the maximum amount each participant could borrow is largely based on the testimony of Stanley Traub, FirsTier's trust officer, (App. 70-71), and other evidence admitted at trial. Additionally, the paragraph on page 20 deals specifically with the one 1984 loan that was outstanding. The reference to "all" loans were outstanding is in reference to the previously mentioned 1984 and 1987 loans that were outstanding at the time FirsTier filed its complaint. (App. 17) However, the most critical omission by the Eighth Circuit is their failure to conclude that a conflict of interest existed. Even FirsTier did not dispute this in their Brief and the undisputed facts establishing a conflict of interest bear repeating.

The trust officer for the Plan and his immediate supervisor testified at trial that they knew that FirsTier was a creditor of LPC and that LPC was in a precarious financial condition. The trust officer also testified that his immediate supervisor informed him that LPC was in danger of defaulting on its loan. They also testified that they had a meeting, several days prior to the transfers in question, with Anthony Dombrowski, LPC's president and the Plan Administrator. At this meeting, Dombrowski

requested a direct transfer of funds in the Plan to LPC in violation of ERISA, which they refused. Several days later, FirsTier received a document signed by Dombrowski as Plan Administrator requesting participant loans for four employees. The trust officer and his supervisor were aware of and approved these loans. The loan proceeds transferred from the Plan to the participants, to Dombrowski, and *then back to FirsTier on a loan LPC owed to FirsTier*. (App. 20) (emphasis added)

In its opinion, the Eighth Circuit did not specifically note that in the March 27 meeting, Dombrowski made a direct request to transfer plan assets to LPC or that the trust officer believed that LPC was in danger of defaulting on its loan to FirsTier. These critical facts were included in the Petitioner's writ and were not refuted by FirsTier in their brief. For the Court's convenience, the trust officer's testimony regarding these facts is included in the Appendix. (App. 70-74) Even if the foregoing omissions are excluded, the Eighth Circuit noted that the trust officer knew his bank was a creditor, knew of LPC's "heavy indebtedness and feared misuse of Plan assets." Clearly, this establishes, as a matter of law, a situation in which the trust officer's motives might conflict with the beneficiaries. Thus, the issue before this Court is the standard that should be followed if a trustee fails to avoid a conflict of interest.

The Eighth Circuit held that a conflict of interest did not exist because a conflict is only created if "the bank has been influenced by a desire to promote its own interest." (App. 49 footnote 6). However, the authority cited from *Scott on Trusts* is taken completely out of context because it is included in a section that discusses the duty

of loyalty and bank trustees are not noted as exceptions to the strict liability rules. (See, IIA *Scott on Trusts*, Section 170.25.)

The underlying purpose for the strict liability doctrine has been stated most eloquently by Judge Cardozo:

> "many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions * * * Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."
>
> *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928)

This principle was recognized by the Eleventh Circuit in *Brown v. Blue Cross and Blue Shield of Alabama*, 898 F.2d 1556 (11th Cir. 1990). For this reason, it held that the beneficiary need not show that a trustee: acted in bad faith, gained an advantage or the beneficiary was even harmed because the law presumes the fiduciary acted disloyally. *Id.* at 1565.

Under common law, the only exception to the strict liability standard was that the conflict was too remote or too feeble. Congress specifically subjected a trustee involved in a plan participant loan to Section 404 of

ERISA. (App. 65) Therefore, it did not consider an indirect transfer to a party at interest as too remote. Furthermore, FirsTier received both an indirect and a direct benefit when the loan proceeds were used by LPC to pay a portion of its debt. Therefore, there is a clear causal nexus between the loans in question and the conflict. Finally, Ninety-Three Thousand Nine Hundred Fifty Dollars ($93,950) is not a feeble amount.

FirsTier contends that the Petitioner did not prove intent or that FirsTier knew it would receive a benefit from the transfers. Pursuant to *Brown* and common law, these findings are totally irrelevant because they involve the subjective intent of the trustee. Common law clearly recognized that it would be virtually impossible for a court to determine subjective intent. For this reason, it struck down *all* transactions once the conflict was established. See *Fulton National Bank v. Tate*, 363 F.2d 562 (5th Cir. 1966) (emphasis added). Additionally, the Petitioner has never alleged that there is a per se conflict of interest if the bank is a creditor and a trustee. The Petitioner simply states that this case is clearly distinguishable due to the trustee's knowledge. Additionally, FirsTier's reliance on *Ershick v. United Missouri Bank*, 948 F.2d 660 (10th Cir. 1991) is also misplaced. The trustee in *Ershick* was subject to the directions regarding investment activities. ERISA specifically permits a trustee to be directed regarding investment activities, but not trustee responsibilities. (See ERISA Sections 405(c)(1) and (3), 29 U.S.C. Sections 1105(c)(1) and (3) and discussion in Part IV, infra.)

Common law developed the strict liability standard because there is no greater threat to the fiduciary relationship than a trustee that acts with dual loyalties. IIA *Scott on Trusts*, Section 170, p. 311 and *G. Bogert & G. Bogert, Law of Trusts and Trustees*, Section 543, p.217 (2nd Rev.Ed.1982) However, the trial court inexplicably failed to incorporate it in their decisions. If a court can be so callous as to ignore a clear conflict of interest which was established solely upon admissions against interest on behalf of the trustee in a transaction in which the trustee receives the ultimate benefit, ERISA's high standard of fiduciary care simply is meaningless. It is only a matter of time before ERISA is at a level "trodden by the crowd" and the abuses of the past will quickly re-emerge.

III.

A UNIFORM RATIONAL METHOD OF AWARDING ATTORNEY FEES MUST BE ESTABLISHED.

FirsTier alleges that the Petitioner has attempted to mislead this Court in the interpretation of *Leigh v. Engle*, 858 F.2d 361 (7th Cir. 1988). For the sake of brevity, the Petitioner simply notes that in the first trial, the trial court had awarded a defendant bank attorney fees for successfully defending itself in an ERISA lawsuit. *Leigh v. Engle*, 727 F.2d 113 (1984). The Seventh Circuit reversed this award because:

> "courts have developed standards for the exercise of their discretion in awarding attorneys' fees under ERISA (citing the five factor formula). The district court made no findings and apparently undertook no analysis that would justify an award of attorney fees." *Id.* at 139.

In the case at hand, the lower court similarly made no findings and undertook no analysis when it made its attorney fee award. This is absolutely critical. Two circuit courts have held that it is abuse of discretion as a matter of law for a trial court to award a prevailing defendant an attorney fee without applying the five factor test. *Franklin v. Thornton*, 983 F.2d 939 (9th Cir. 1993) and *Quesenberry v. Life Ins. Co. of North America*, 987 F.2d 1017 (4th Cir. 1993) Therefore, assuming arguendo that FirsTier's analysis of *Leigh II* is correct, it only accentuates the split in the circuits.

This case readily demonstrates the need of a rational basis for awarding fees. In *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), this Court invited the lower courts to develop common law rights and duties under ERISA. Based upon this invitation, the Petitioner brought a case predicated, in part, upon the common law doctrine of strict liability if a trustee failed to avoid a conflict of interest. This Court has never ruled whether this doctrine applies in ERISA. However, interpreting the language of Section 404 of ERISA to require a trustee "avoid conflicts of interest," it strongly has suggested that this doctrine applies. But to award a prevailing trustee their entire fee request without explanation when the basis of the participants' suit is predicated upon universally accepted common law principles, is simply a basic due process violation. It is even more egregious when the prevailing trustee is awarded fees for alleging positions that were erroneous as a matter of law. FirsTier contends that this was necessary because of its "original application to the court." (Respondents' Brief p. 18). If this is true, one wonders why the Eighth Circuit found it

necessary to reject this contention with special emphasis in its opinion. ("FirsTier argues that it had *no* fiduciary duty . . . ") (App. 43) (emphasis in original). Yet, the Eighth Circuit awarded FirsTier fees for a position that was erroneous as a matter of law. Intervention of this Court is necessary to preserve the enforcement scheme of ERISA.

IV.

FIRSTIER CANNOT BE A DIRECTED TRUSTEE AS A MATTER OF LAW.

In their brief, FirsTier alleges that they were a "directed" trustee pursuant to Section 403(a) of ERISA (29 U.S.C. Section 1103(a)). This authority is clearly distinguishable because it either applies to investment committees (see ERISA Section 403(a)(1) 29 U.S.C. Section 1103(a)(1)) or is expressly conditioned by Section 405(c)(1) (29 U.S.C. Section 405(c)(1)) which specifically prohibits a trustee from allocating trustee responsibilities. Section 405(c)(3) (29 U.S.C. Section 1105(c)(3)) of ERISA defines trustee responsibilities to include the duty to manage and control the assets of the plan and the Department of Labor has stated that the administration of a participant loan program is the management of plan assets. (App. 65) Accordingly, a trustee involved in a participant loan program cannot be "directed" as a matter of law, otherwise they have allocated their responsibility.

The Eighth Circuit agreed that the trustee involved in a plan participant loan is subject to Section 404 of ERISA. (App. 45) Their ruling, though, held that, due to the fact the Petitioner requested the transfer and the judge ruled

the employees were not coerced, it would not determine whether FirsTier should have known of the indirect transfer. Therefore, FirsTier did not breach its duty.

The inherent fallacy in this position is that this suit is based upon a breach of the fiduciary's duties. Obviously, any plan participant must request a participant loan. If a court may use this request to modify or alleviate the fiduciary from their duty, a sliding scale of fiduciary conduct will develop and soon portions of ERISA will be at a level "trodden by the crowd." For this very reason, common law held that the mere fact that a beneficiary requests an act, did not constitute consent. *Restatement (Second) of Trusts,* Section 216 Comment a (1959).

Furthermore, FirsTier did not refute in any manner the Petitioner's statement that when Anthony Dombrowski requested the loans in question, that he informed the Petitioner that LPC would cease operations if the loans were not made. Pursuant to Section 8(a)(1) (29 U.S.C. § 158(a)(1)) of the Labor Management Relations Act, this type of statement is coercion as a matter of law; and it should be pursuant to ERISA, as well. Assuming arguendo that this Court rules the employees were not coerced, coercion was simply just one of the elements of consent. *Restatement (Second) of Trusts,* Section 216(2) (1959). This Section requires a fiduciary to inform the beneficiary of all of the information he knows or should know and to inform him of his rights. *Id.*, comment k. More importantly, the fiduciary has the burden of proof on these issues, *G. Bogert & G. Bogert, Law of Trust and Trustees,* Section 941 p. 457 (2nd Rev. Ed. 1982), and the record is completely devoid as to whether FirsTier fulfilled this obligation. In the case at hand, it would be

difficult to imagine a more egregious fact pattern indicating that an indirect transfer to a party at interest, that the trustee knew was in serious financial difficulty. Accordingly, if ERISA is truly a statute to protect employees' rights, then it is axiomatic that a beneficiary must be fully informed of these rights and the information the trustee knows or should know before they can consent.

Accordingly, the Eighth Circuit's refusal to determine whether the trustee should have known of the transfers because of the trial court's coercion finding is erroneous as a matter of law because the required elements of consent are not in the record. Furthermore, FirsTier merely processed the loans and, therefore, never fulfilled its obligation. As the Second Circuit held: "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same." *In Re Beck Ind., Inc.*, 605 F.2d 624, 636 (2nd Cir. 1979). This Court should adopt the identical view.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

29 U.S.C. Section 1103(a)
Section 403(A) of ERISA .....App. 66

29 U.S.C. Section 1105(c)1
Section 405(c)(1) of ERISA .....App. 67

29 U.S.C. Section 1105(c)3
Section 405(c)(3) of ERISA .....App. 67

Letter dated May 4, 1994 from U.S. Department of
Labor addressed to James E. Bachman ..... app. 68

Restatement (Second) of Trusts, Section 216(2)
(1959) Comment k.....App. 69

Direct Examination of Stanley A. Traub; pages 88
and 89 of Official Transcript of Proceedings -
December 3-6, 1991.....App. 70

(a) amount of participants' loans.....App. 70

(b) Dombrowski's request for Plan assets....App. 71

(c) knowledge of LPC's potential for default...App. 72

§ 403. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees. Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 402(a) [29 USCS § 1102(a)] or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that –

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this Act, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 402(c)(3) [28 USCS § 1102(c)(3)].

* * *

§ 405. Liability for breach by co-fiduciary

* * *

(c) **Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities.** (1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

* * *

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 USCS § 1102(c)(3)].

U.S. Department of Labor Office of the Solicitor
Washington, D.C. 20210
(SEAL)

VIA FEDERAL EXPRESS No. 8983473800

May 4, 1994

James E. Bachman, Esq.
9202 West Dodge Road
Suite 302
Omaha, Nebraska 68154-4409

Re: FirsTier v. Land Paving, et al.

Dear James:

I am writing to inform you that the Department of Labor is not able to assist your clients in the filing of a writ of certiorari before the United States Supreme Court in the above referenced case.

The Office of the Solicitor General permits U.S. Government Agencies to file amicus briefs before the Supreme Court only if the Court specifically asks for the U.S. Government's views. If you do file the writ of certiorari and the Court asks for our input, we would be happy to revisit the issue at that time.

We appreciate the time you have invested in communicating your thoughts to us and in bringing this matter to our attention.

Very truly yours,

/s/ Alexander Fernández
Trial Attorney
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
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Restatement (Second) of Trusts, Section 216(2) (1959) Comment k

k. Beneficiary's ignorance of facts and of his rights. Since the trustee is in a fiduciary relation to the beneficiary, he should inform the beneficiary of his rights and of the material facts affecting a transaction which is a deviation from the terms of the trust, so far as the trustee knows or should know these facts. The consent of the beneficiary does not preclude him from holding the trustee liable for a deviation from the terms of the trust, unless the beneficiary understands that the transaction is a deviation from the terms of the trust and that he is entitled to require the trustee to administer the trust according to its terms . . .

* * *

Q. (By Mr. Bachman) Mr. Traub, what would – regarding a loan for a plan participant, how much could a plan participant borrow?

A. Under the law, the maximum amount is $50,000 or one-half or 50 percent of his vested accrued benefit, whichever is the most.

Q. And I believe you testified previously that Mr. Olsen borrowed $50,000; is that correct?

A. That's correct.

Q. Are you aware of how much money Mr. Lonergan borrowed?

A. I believe – Is this in 1987?

Q. Yes, this is in 1987.

A. I think 7,500.

Q. Okay. Do you know why he didn't borrow more than $7,500?

A. Because he had an outstanding loan.

Q. And how much was that loan?

A. Forty-two five, if I recall.

Q. So therefore he couldn't borrow more than $7,500 in April of 1987?

A. That's correct.

Q. How much did Mr. Vercoe borrow?

A. I frankly don't recall.

Q. It has been admitted into evidence that he borrowed $11,950. That's from Exhibit 5. Does that refresh your memory?

A. I believe that's correct.

Q. It's also referred to in Exhibit Number 9. Do you know why Mr. Vercoe could not borrow any more money?

A. Presumably the 50 percent limitation came into effect.

* * *

T(88:5-25, 89:1-11)

Q. Mr. Dombrowski came to your office at FirsTier?

A. Yes, he did.

Q. Would this have been about March 27th or shortly after that in 1987?

A. March 27th or '8th probably.

Q. Who was present at that meeting?

A. Tom Moore and I and Mr. Dombrowski.

Q. What was said then?

A. Well, we discussed generally the documentation that we needed, and then we asked him why this was being done. And there was – His response at that time was that they were going to buy annuities for the participants with any excess being returned to the company.

* * *

T(53:14-25, 54:1)

Q. Did Mr. Moore ever inform you that they were in danger of defaulting?

A. No, he did not.

Q. What was your understanding then as to the financial condition of Land Paving at the time?

A. Only that they were experiencing some financial difficulties. I had no more knowledge of any specifics.

MR. BACHMAN: May I approach the witness, Your Honor?

THE COURT: You may.

Q. (By Mr. Bachman) Mr. Traub, do you recognize what I have placed in front of you?

A. It's my deposition.

Q. Okay. And you gave your deposition to me. Was counsel present for you at the time?

A. Yes.

Q. Okay. Mr. Traub, I'm going to read from the deposition – a portion of the deposition, and I want you to tell me if I read this correctly.

MR. RILEY: Will you give me page and –

MR. BACHMAN: Yes, page 114.

THE COURT: Is this by way of impeachment?

MR. BACHMAN: Yes.

MR. RILEY: Well, I think, Your Honor, it's improper impeachment, but I guess I have no objection.

THE COURT: All right.

Q. (By Mr. Bachman) Question: "Did he ever inform you that they were in danger of defaulting on any loans."

"Mr. Riley: By they do you mean Land Paving Company?"

"Mr. Bachman: Land Paving."

Answer: "He commented that there was – yes, a possibility of default."

Did you state that?

A. If it's in the deposition I did.

Q. Is that different than the testimony that you just gave in this court a minute ago?

A. It is.

Q. Did you wish to change your answer?

A. To the best of my recollection, I don't – I don't recall that Tom and I discussed the seriousness of it, but if I so testified at that time, then I will so testify now.

Q. So you wish to change your testimony that you knew that Land Paving Company was in danger of default?

A. Yes.

MR. RILEY: Your Honor, I'm going to object and move to strike the answer. He's now changing the statement. The deposition says that there was a possibility of default, not a danger of default.

THE COURT: All right. The answer is stricken without prejudice to you re-asking him the question.

Q. (By Mr. Bachman) Do you wish to change your answer then, Mr. Traub, that you were aware that there was a possibility that Land Paving would default on their loan?

A. That's correct.

* * *

T(69:1-25, 70:1-25, 71:1-5)